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No. 4481

IN THE

United States ~~District~~ Court of Appeals

FOR THE

Ninth Circuit

FRANK C. BERTELMANN, Appellant,

vs.

MARY N. LUCAS, ET AL. Appellees.

Brief for Lincoln L. McCandless

APPELLEE

UPON APPEAL FROM THE SUPREME COURT OF HAWAII

ARTHUR G. SMITH
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Filed this .....day of May, 1925.

F. D. MONCKTON, Clerk.

By .....Deputy Clerk.

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NO. 4481

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FRANK C. BERTELMANN, Appellant,

vs.

MARY N. LUCAS, et al., Appellees..

In Equity.
On Appeal from the Supreme Court of Hawaii

Brief for Appellee, L. L. McCandless

I. INTRODUCTORY; SCOPE OF THIS BRIEF.

The Circuit Court sustained the seven demurrers to the amended Bill upon all grounds. The Supreme Court sustained the decree of the Circuit Court, dismissing the Bill, but only expressed an opinion upon two grounds raised by several of the demurrers; namely: adequacy of the remedy at law and multifariousness. Neither of these two grounds were raised by the demurrer filed on behalf of Appellee L. L. McCandless.

In this case, there is one general question upon the merits which affects all of the parties before the Court, to wit: whether the Appellant acquired title, or the right to compel conveyance of title, to the lands in controversy by virtue of his tenders as alleged.

This Appellee L. L. McCandless claims title to an undivided four-ninths (4/9) interest in said lands conveyed to him by warranty deed from Appellant executed after the tenders were made. On the general question on the merits the interest of this Appellee is identical with that of Appellant. The Supreme Court did not express its opinion upon this general question, and the Appellant has requested this Court to express its opinion upon the same. This Appellee respectfully requests the Court to pass upon this question, regardless of its views upon other questions involved, to the end that the main general question on the merits involved may be settled.

The Appellant, in his amended Bill, prays that the deed to this Appellee be cancelled or treated as a mortgage. So far as this relief is prayed, the interest of Appellant and this Appellee are adverse, and as this Appellee deems the statement of the case of Appellant in that regard to be inadequate and misleading in many respects, a separate statement of case is here included.

This brief will be confined to questions touching Appellee L. L. McCandless' demurrer to the amended Bill.

II. STATEMENT OF CASE.

Appellant's father died on the 15th of March, 1895, owning the lands in controversy in this suit. A widow, three sons, and six daughters survived him. Said deceased left a will which was admitted to pro-

bate, by the terms of which he disposed of his estate. This portion of the will is quoted in paragraph II of the amended Bill. (Tr. pp. 5 to 7, inc.) Under the terms of the will, as therein set forth, the Testator's sons, during the period of one year subsequent to the expiration of the lease to the sugar company therein referred to, which lease expired on the first day of November, 1915, could acquire all of the land upon payment, as therein set forth, of $5,000.00 for each of the others' shares or interests. It is also provided that any one son, if the other sons be "short-coming," could acquire the land by making the payments as stated in the will. The two sons, other than Appellant, were "short-coming" within the meaning of the will.

Appellant desired to comply with the terms of the will and gain title to the lands in controversy, but did not have moneys to make tender or payment of the amounts necessary. It is alleged in paragraph XVII of the amended Bill (Tr. pp. 28 to 34, inc.) that Appellant did not have the necessary money to make the payment, to wit: $40,000.00, and that he had a year within which to raise the money. Appellant went about attempting to raise the necessary amount, and applied to Appellee John C. Lane for assistance, and he, the said John C. Lane, endeavored to get various persons to loan money to Appellant but could find no one who was willing to loan Appellant the required amount. Appellant requested Appellee Noah W. Aluli to obtain the amount necessary to enable Appellant to make the payments. Appellant finally secured the

agreement of Appellee L. L. McCandless to advance the $40,000.00. This agreement is set forth fully in said paragraph XVII. This agreement is dated the 30th day of October, 1916. Under its express provision, this Appellee L. L. McCandless agreed to pay $40,000.00 to Appellant, so that Appellant could make tender, and, in return for such payment, the Appellee L. L. McCandless was to receive a four-ninths (4/9) undivided interest in the lands, and said agreement purported to convey a four-ninths (4/9) undivided interest in said lands to Appellee L. L. McCandless.

Appellant received the $40,000.00 from Appellee L. L. McCandless and made tender of the same, and when tender was refused, Appellant deposited the money tendered in The First National Bank of Hawaii at Honolulu, and said money has ever since been held by said bank as tender. (Tr. paragraph VI, pp. 11, 12; paragraph IX, pp. 13, 14.) These tenders were made October 30, 1916 and October 31, 1916.

Subsequent to the tender and deposit of $40,000.00 in the bank as continuing tender, and on November 22, 1916, Appellant executed a conveyance, which, among other things, conveyed to Appellee L. L. McCandless a fee simple title to an undivided four-ninths (4/9) interest in the lands in dispute. This conveyance is by way of warranty deed and is set forth in paragraph XIX of said amended Bill. (Tr. pp. 38, 39, 40, 41.) By separate provisions of the same instrument, Appellant conveyed an undivided two-ninths (2/9) interest in said land to Appellees Noah W. Aluli and John C.

Lane. The consideration expressed in said deed for the conveyance to Appellee L. L. McCandless is the payment of said sum of $40,000.00 to Appellant. The consideration expressed in said deed as given by John C. Lane and Noah W. Aluli in return for the conveyance to them is the fact that they have counseled and acted as attorneys for Appellant. Both the considerations and the conveyances, to Appellee L. L. McCandless on the one hand, and to John C. Lane and Noah W. Aluli on the other hand, are totally distinct and separate. Noah W. Aluli and John C. Lane were Appellant's agents to secure the money. Neither John C. Lane nor Noah W. Aluli were alleged to be the attorneys or agents of this Appellee L. L. McCandless, and they were not such in fact, but were solely agents of the Appellant.

Appellant had the advice of his own attorneys and had the advice of an independent attorney as early as September 17, 1917, and through this attorney, W. J. Robinson, Appellant made demand on Aluli and Lane that they reconvey to Appellant the two-ninths (2/9) interest in said land, upon the ground that such conveyance to Lane and Aluli was obtained through connivance, misrepresentation, fraud and deceit of Lane and Aluli. (Tr. pp. 42, 43.)

Subsequent thereto, and on the 10th day of January, 1918, Appellant, Appellee L. L. McCandless and Aluli and Lane, as plaintiffs, filed a suit in ejectment to recover the lands in controversy. (Tr. pp. 44, 45.) Appellant alleges that by payment of the sum of $40,000.00, which was paid by Appellee L. L. Mc-

Candless to Appellant, Appellant could secure this land, which was worth at that time at least $800,000.00, and more nearly $1,250,000.00. (Tr. p. 34.) It is alleged in said amended Bill that Appellee L. L. McCandless was at liberty to take back the $40,000.00, and it is alleged that said moneys had never been taken back by this Appellee L. L. McCandless, but have remained on deposit in the bank as a continuing tender. The amended Bill further alleges that if he could not acquire $40,000.00, he would lose all rights to acquire the land, which he alleges to be worth $800,000.00 and more. (Tr. p. 34.)

The Appellant on July 10, 1922 filed his original Bill in the above matter and named various Respondents, including as a Respondent this Appellee L. L. McCandless. No affirmative relief was prayed for as against the Appellee L. L. McCandless, and Appellant therein stated that he consented that a decree be entered in favor of this Appellee L. L. McCandless for a four-ninths (4/9) interest theretofore conveyed to him by Appellant by deed of November 22, 1916. On July 25, 1922, Appellant filed his amended Bill, praying for specific relief against Appellee L. L. McCandless. This Appellee filed a Demurrer thereto upon the grounds as set forth in the record, (Tr. pp. 117 to 120, inc.) and relies upon all of the ground of said Demurrer.

III. THE AMENDED BILL DOES NOT STATE A CAUSE OF ACTION AGAINST APPELLEE L. L. McCANDLESS FOR CANCELLATION OR MODIFICATION OF THE AGREEMENT DATED OCTOBER 30, 1916 OR OF THE DEED DATED NOVEMBER 22, 1916.

Under this heading, we shall discuss generally the first six grounds of this Appellee's Demurrer.

The Appellant is praying that the Court treat the agreement dated October 30, 1916 and the deed dated November 22, 1916 as mortgages, or to cancel the same.

The amended Bill does not state any facts showing that at the time the transactions were entered into, any of the parties intended these documents to operate as mortgages. The amended Bill does show that Appellant could not borrow the money necessary to make the tender, and it also shows affirmatively that the agreement dated October 30, 1916 was meant by the parties at the time to be an agreement to convey to Appellee L. L. McCandless a four-ninths (4/9) interest in the property, all of which was procured with the $40,000.00, in return for the tender and payment of the $40,000.00. The amended Bill shows that the parties never intended this agreement to be an agreement for a mortgage, but intended it to be a sale agreement as it shows on its face.

The amended Bill further shows that the deed of November 22, 1916 was meant to be a conveyance of an

undivided four-ninths (4/9) interest in the land to Appellee L. L. McCandless as an absolute conveyance in fee simple, and that it was a warranty deed.

There is no allegation in the amended Bill that Appellant conveyed the four-ninths (4/9) interest to this Appellee by mistake, or that Appellant meant either the agreement or deed to be a mortgage. No acts of the Appellee L. L. McCandless are shown which are fraudulent in regard to the execution of either the agreement or deed. The amended Bill, on its face, therefore, shows that Appellant is asking a Court of Equity to make a new agreement between himself and the Appellee L. L. McCandless—an agreement different than the one that they entered into. The amended Bill showed that Appellant had agreed to convey, and did convey, absolutely a four-ninths (4/9) interest in fee simple, and not by way of mortgage, to the Appellee L. L. McCandless.

Under such circumstances a Court of Equity will not make a new agreement for the parties under the guise of "reformation" of the agreement.

"In general, in order to warrant reformation there must be a mutual mistake; a mistake shared in by both parties." 21 C. J. p. 87, para. 63.

The Supreme Court of the United States holds that in order for a Court of Equity to reform a written contract it must clearly appear that there has been a mistake and

"The mistake must be mutual and common to both parties to the instrument. It must appear that both

have done what neither intended." Hearne v. Marine Insurance Co., 20 Wall 488 at 491.

The parties have made an agreement and a deed which accorded with their full understanding and agreement at the time the same were made, and it is respectfully submitted that as no facts showing any fraud of Appellee L. L. McCandless are alleged, law as well as equity requires the parties to be bound by their agreement and deed.

Upon what grounds does Appellant seek relief from a Court of Equity against the Appellee L. L. McCandless? This does not appear clearly in the amended Bill. On page 122 of Appellant's brief it is contended that the consideration furnished by the Appellee L. L. McCandless was so inadequate that a Court of Equity would hold the transaction fraudulent. Let us see whether there are any allegations of fact showing gross inadequacy of consideration. In paragraph XVIII (Tr. p. 34) Appellant alleges that he could get land worth $800,000.00 to $1,250,000.00 if he could raise $40,000.00—Appellant did not own the land—but he could acquire it by the payment of $40,000. Appellant, through Aluli, his agent, sought out Appellee L. L. McCandless and requested Appellee L. L. McCandless to furnish him, Appellant, $40,000.00, to make the tender. Appellee McCandless did not seek Appellant. Appellee McCandless agreed to furnish the $40,000.00 to Appellant if Appellant would agree to deed, and deed a four-ninths (4/9) interest in the land to Appellee McCandless. Appellant agreed to this, and by this agreement Appellant did not lose anything, but in his amended Bill he shows that by

virtue of this payment and agreement, he, Appellant, gained a two-ninths (2/9) interest in the land. This two-ninths (2/9) interest never cost Appellant one cent —Appellee McCandless furnished the $40,000.00 which procured it for Appellant.

Appellant's amended Bill shows that he not only did not lose anything, but that he gained, without any cost to himself, a two-ninths (2/9) interest in the land.

In the light of the facts as shown in the amended Bill, Appellant has shown no loss arising to him out of the transaction, but has shown a gain of a two-ninths (2/9) interest in the land. How can Appellant claim that the bargain between himself and Appellee McCandless was unconscionable? In fact the Bill shows that Appellant's stand is unconscionable.

The amended Bill shows that Appelant not only lost nothing, but that he made a profit by entering into the transaction.

Appellant, in his brief, has not shown a single case ever decided by any court holding that a transaction can be set aside in equity for alleged inadequacy of consideration, when the Petitioner made a profit from the transaction.

It is submitted that Appellant is not coming into Equity with clean hands—his amended petition and bill show that he used Appellee McCandless to make a profit in 1916, and he now seeks to retain that profit and also to set aside the agreement in order to gain another profit thereby.

In one case, Petitioner contracted to settle financial affairs with her husband for $2000.00, conditional upon her getting a divorce. She got the divorce and

afterwards brought suit in Equity to set the contract aside. The Court held that she did not come into Equity with clean hands. She got the benefit she bargained for by the contract and then, after she got the benefit, i. e. the divorce—she couldn't go back on the bargain. Lake v. Lake, 119, N. Y. S. 686.

Further—the amended petition and bill shows that Mr. McCandless parted with his $40,000.00—and got in return—not the four-ninth (4/9) interest in the land, but an agreement and a deed purporting to pass a four-ninth interest in the land. That was almost nine years ago and the amended bill shows that Appellee McCandless has never had possession of the land; has never received any rents or profits from the land; but, on the contrary, has been involved in costly lawsuits in relation to his claim to the land.

It is respectfully submitted that the amended Bill does not contain facts which support Appellant's claim.

On page 122 of his brief, Appellant cites Williams v. Kaea, 1. Haw. 423, and Souza v. Soares, 21 Haw. 330, on the abstract proposition that gross inadequacy of price may be alone sufficient to prove fraud.

As we have shown above, that proposition is not involved upon the facts as shown in the amended Bill.

Appellant also cites there the later case of Sumner v. Jones, 22 Haw. 23. This case is directly opposed to Appellant's contentions. In this case property owned by Petitioner, which was worth $6,000.00 over and above encumbrances, was conveyed for $500.00, and an agreement to set aside a portion of the rents for life—which portion was not stated. The Supreme Court stated at p. 25 —

"The law recognizes the right of the owner of property, being of sound mind, to sell and dispose of his property upon such terms as he may see fit or to give it away if he desires to . . . ."

The Supreme Court sent the case back to the Circuit Court to take further evidence in relation to Petitioner's mental condition at the time of signing the deed.

It is respectfully submitted that this case must be taken as establishing the law in Hawaii, adversely to Appellant's claim—the Appellant does not contend that he is or was in 1916 mentally incompetent.

The contract and deed are not harsh and unjust, but if they were, yet it is respectfully submitted that a Court of Equity would not render its assistance to the Appellant. He fully understood the contract he was entering into.

"So far as the charge that the contract is harsh and unjust is concerned, it may be said that the parties were competent to contract with each other, and neither side can be relieved from their agreements on the ground that they did not use good business judgment in entering into the contract." Poe v. Ulrey, 233 Ill. 56 at 63: See also Summer v. Jones, supra.

In one case Petitioner leased standing timber with the right to enter upon the land and cut it, and the Court held, though respondent did not cut it within a reasonable time, a Court of Equity could not cancel the contract.

The Court stated at p. 80:

"There is no law restricting the right of all persons to make contracts to suit themselves, when the contracts

violate no law. The safety of commercial transactions depends upon this. Should courts undertake because of improvidence, to set aside contracts which are lawful, it would invade personal rights and disturb and destroy the safety of business transactions. When parties have made lawful contracts in language, leaving no doubt as to the intention, there is no ground for any interference by the courts, but the contract must be be enforced as written." Butterfield Lbr. Co. v. Guy, 46 So. 78 (Miss.).

The facts alleged in the amended Bill do not show that Appellee took any advantage of Appellant. Even if he had, a contract will not be cancelled, because one party took advantage of the necessitous condition of another where there is no actual fraud. Carley v. Tod 31 N. Y. S. 635.

The cases further show that the mere deriving of an enormous profit out of a transaction is no ground for setting a conveyance aside—or reforming it.

Here, it might be pointed out, the amended Bill has shown no profit that Appellee McCandless has yet realized, for it shows that he has not yet been able to get the land, though the deed was executed nearly nine years ago. Even if Appellee McCandless had realized a profit yet a Court of Equity would not set the agreement and deed aside.

In one case a person owned a vested interest in an estate, which apparently, would not come into possession for years and he sold it for a price equal to about one-fourth (¼) of the principal. The Court held that he couldn't have the sale set aside when the life tenant died a few months after the deed was executed. Jack-

son's Estate, 203 Pa. 33 at 37. See Phillips Estate, 205 Pa. 511.

Mere inadequacy of consideration will not be sufficient to set aside a sale. Cribbons v. Markwood, 13 Gratt. (Va.) 495; To same effect see Provident Life & Trust Co. v. Fletcher, 237 Fed. 104, 109-10;

The Court stated at p. 894:

"The mere fact that a person derives enormous profits as the fruit of an agreement dependent upon contingencies cannot be claimed as sufficient to warrant the court in adjudging the price unconscionably small." Hagan v. Ward, 77 N. Y. S. 893.

This latter case shows that contingencies must be taken into account.

Appellant claims in his brief on pages 122 to 124 that Equity has jurisdiction to grant relief against fraudulent conduct of Lane, the friend and counsellor, and Aluli, the attorney of Appellant, and that McCandless is somehow or other bound by the conduct of Lane and Aluli. All through Appellant's brief he is continuously using the phrase "McCandless and Associates", referring to McCandless, Aluli and Lane. The allegations of the amended Bill show clearly, as we have stated above, that Aluli and Lane were the associates and advisors of Appellant, and it was through them that the Appellee McCandless was enticed into the transaction. Appellant should rather have said "Appellant and his Associates Aluli and Lane."

The argument and statements above referred to are obvoiusly made to attempt to make out a case of implied fraud as to Appellee McCandless. The amended Bill shows that Appellant himself had direct deal-

ings with Mr. McCandless; that Appellant was fully cognizant and aware of all the facts at the time he dealt with Mr. McCandless; that the consideration paid by Mr. McCandless was entirely separate and distinct from the consideration of Lane and Aluli and was different in kind—viz. Mr. McCandless paid $40,000.00, while Messrs. Lane and Aluli paid and were to pay in services—Mr. McCandless was to get a distinct and separate interest, viz: an undivided four-ninths interest in the land. Appellant with full knowledge of the facts dealt directly with Mr. McCandless. Obviously, the cases cited by Appellant do not apply to facts such as are shown by the amended bill in the present case.

It is respectfully submitted that the amended Bill sets forth no case for revoking or cancelling the agreement and deed as against the Appellee McCandless.

IV. THE AMENDED BILL SHOWS THAT THE APPELLANT IS NOW BOUND BY HIS ACQUIESCENCE AND LACHES FROM RAISING A CLAIM FOR CANCELLATION OR REFORMATION AGAINST THE APPELLEE McCANDLESS.

The amended Bill shows that Appellant entered into the agreement to convey a four-ninths (4/9) interest in the land to Appellee McCandless for $40,000.00 will full knowledge of all of the facts. That after this agreement was signed Appellee McCandless paid the consideration, viz: $40,000.00 to Appellant.

Then after Appellant had entered into the agree-

ment on October 30th, 1916, secured the money, and made his tender, he, with full knowledge of all the facts, executed the deed of November 22, 1916, thereby purporting to convey an undivided four-ninths (4/9) interest in the land to Appellee McCandless in fee simple.

The execution of this deed was a ratification of the agreement. See National City Bank v. Wagner, 216 Fed.473. In that case A. made a conveyance to the bank, the court found, under undue influence and fraud, on March 3, 1913. On March 12, 1913, after discovering the fraud, A. made another instrument conveying her equity of redemption to the bank—the Court held that the second instrument ratified and confirmed the invalid first agreement. See also Winston v. Pittfield, 108 N. E. 1038 at 1039.

Also the amended Bill shows that over a year later Appellant joined in the 1918 ejectment suit with McCandless as co-plaintiff, upon the theory that McCandless was the owner of a four-ninths (4/9) interest in the land.

Bringing a suit with full knowledge of the facts, which suit treats an alleged invalid contract or deed as legal, is a ratification of it, and thereafter the transaction is unimpeachable. Merrill v. Wilson, 33 N. W. 716 at 721.

Appellant has heretofore argued that Appellee McCandless cannot be heard to claim that Appellant was guilty of laches when it is apparent from the averments of the Bill that Appellant did not have the independent advice of counsel (other than counsel of

Appellee McCandless) etc. In reply thereto it is stated in paragraph XIX of the amended Bill that in the year 1917 Appellant's attorney was W. J. Robinson and that W. J. Robinson claimed on his behalf that the deed to Aluli and Lane should be cancelled. If affirmatively appears therefore that Appellant did have advice of independent counsel.

Under such circumstances a Court of Equity will not hear a claim by a grantor to set aside or reform his own deed when he waits six years after knowledge of all the facts to bring action, but the Court of Equity will hold the grantor bound by his own acquiescence and laches.

The rule in regard to acquiescence is stated as follows:

"Acquiscence and lapse of time. A second mode by which the remedial right may be destroyed; and the transaction rendered unimpeachable, is acquiescence—The theory of the doctrine is, that a party thus having recognized a contract as existing and having done something to carry it into effect and obtain or claim its benefits, although perhaps only to a partial extent, and having thus taken his chances, cannot be afterwards suffered to repudiate the transaction and allege its voidable nature.—

When a party, with full knowledge or at least with sufficient notice or means of knowledge of his rights and of all the material facts, freely does what amounts to recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation—there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity." Pom-

eroy Eq. Juris, Par. 965 (and see cases cited).

In one case, plaintiff, upon joining a certain order, transferred, for no consideration at all, all her property to that order. She finally left the order and six (6) years afterwards she brought a suit to annul the conveyance claiming that it was procured by undue influence.

At page 188, the Court states—

"In this state of things, I can only come to the conclusion that she deliberately chose not to attempt to avoid her gifts, but to acquiesce in them, or, if the expression be preferred, to ratify or confirm them. It was urged that the plaintiff did not know her rights until shortly before she asked for her money back. But, in the first place, I am not satisfied that the plaintiff did not know that it was at least questionable whether the defendant could retain the plaintiff's money if she insisted on having it back. In the next place, if the plaintiff did not know her rights, her ignorance was simply a result of her own resolution not to inquire into them." Allcard v. Skinner, L.R. 36, Chan. Div. 145.

In our case the amended Bill shows that appellant deliberately chose not to attempt to avoid his deed.

The Supreme Court of the United States holds, that the absence of a prompt election to avoid a conveyance is an election to confirm it. Twin Lick Oil Co. v. Marbury, 91 U. S. 587; Steinbeck v. Bon Homme Mine Co., 152 Fed. 333;

Appellant executed freely and voluntarily both the agreement and deed which he now seeks to set aside. He has treated the deed of November 22, 1916, as a

perfectly valid deed from the day it was signed up to the filing of the amended Bill herein. In Appellant's original Bill filed herein it is alleged to be a deed. Such course of conduct should be held to be binding upon appellant.

V. REPLYING TO MISCELLANEOUS STATEMENTS IN APPELLANT'S BRIEF.

The statement is contained on page 118 of Appellant's brief that the amended Bill alleges that Appellee McCandless "drove an unconscionable bargain" with Appellant.

In III above we have shown that the amended Bills shows the facts to be that appellant profited by entering into this so-called "unconscionable bargain." The statement above quoted is a mere conclusion of the appellant and it is respectfully submitted that the allegations of fact in the amended Bill are controlling.

The appellant on pages 119 and 120 of his brief states that appellee McCandless reserved the right to withdraw the $40,000. The allegations of the amended bill, however, show that this $40,000 is and has been at all times in the First National Bank as a continuing tender. Appellant is certainly erecting scarecrows to bolster up his unjust and inequitable position. As a matter of fact, appellee L. L. McCandless is the only person who is really seriously out and injured by the whole matter. Appellee McCandless has parted with his $40,000 and for nearly nine years this $40,000 has stood as a continuing tender. Appellant's position in

his brief in this regard shows clearly that he is not coming into equity with clean hands. After having enticed this appellee into putting up $40,000 on appellant's behalf, he has given this appellee nothing but a deed and the privilege of being engaged in expensive litigation in regard to the title to the land conveyed ever since.

It is stated at page 122 in appellant's brief that McCandless claimed the ownership and control of the money after the tender was refused. The allegation in the amended Bill, however, as we have heretofore stated, shows that said money has always been in the possession and control of the First National Bank as a continuing tender.

Dated at Honolulu, T. H., May 1st, 1925.

Respectfully submitted,

Arthur G. Smith
Urban E. Wild
Attorneys for Appellee L. L. McCandless

No. 4481

United States Court of Appeals

FOR THE

NINTH CIRCUIT 2

FRANK C. BERTELMANN,

Appellant,

v.

MARY N. LUCAS, et al.,

Appellees.

Appeal from the Supreme Court of the Territory of Hawaii.

BRIEF OF MARY N. LUCAS AND CHARLES LUCAS, APPELLEES.

ROBERTSON & CASTLE,
A. G. M. ROBERTSON,
Attorneys for Mary N. Lucas and Charles Lucas, Appellees.

Filed this.....day of....., 1925.

F. C. MONCKTON, Clerk,

By....., Deputy Clerk.

No. 4481

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FOR THE

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Appellees.

Appeal from the Supreme Court of the Territory of Hawaii.

BRIEF OF MARY N. LUCAS AND CHARLES LUCAS, APPELLEES.

STATEMENT OF THE CASE.

This case comes to this court upon the appeal of the petitioner below from a decree of the Supreme Court of Hawaii affirming the decree of the Circuit Judge of the Fifth Circuit, Territory of Hawaii, sitting in equity, sustaining demurrers to a bill in equity.

The averments of the bill have been summarized in the opinion of the Supreme Court (Record, pp. 135-143) and in the Appellant's brief.

The Respondents Mary N. Lucas and Charles Lucas demurred to the bill on the following grounds:

I.

That the Plaintiff has not in and by his said bill made or stated such a cause as entitles him to the relief prayed for or any relief in equity from or against this Respondent.

II.

That there is a misjoinder of parties Respondent in said bill in that Plaintiff has joined this Respondent in a cause or causes sought to be alleged against each and all the Respondents other than Charles Lucas in which this Respondent has no interest and as to which no relief is sought against this Respondent.

III.

That said bill is multifarious in that the same is exhibited against this Respondent and the several other Respondents therein named for entirely distinct matters and causes as to which or the greater part of which, as appears by the said bill, this Respondent is not in any manner interested or concerned, and ought not to be implicated, to wit: (a) the matters, things and causes averred or sought to be averred in Paragraphs IX, X, XI and XXII with

respect to the Respondents Janet M. Scott and Rubena F. Scott; (b) the matters, things and causes averred or sought to be averred in Paragraphs XVI, XVIII, XIX, XX and XXI with respect to the Respondents L. L. McCandless, Noa W. Aluli and John C. Lane; (c) the matters, things and causes averred or sought to be averred in Paragraph XXIII with respect to the Respondent Bishop Trust Company, Limited; (d) the matters, things and causes averred or sought to be averred in Paragraphs XVI and XXIV with respect to the Respondents Kilauea Sugar Company and Kilauea Sugar Plantation Compnay; and (e) the matters, things and causes averred or sought to be averred in Paragraph XXII with respect to the First National Bank of Hawaii at Honolulu.

IV

That said bill is also multifarious in that several separate and distinct causes or purported causes are therein sought to be averred against this Respondent, to wit: In Paragraphs I to IX inclusive, with respect to the Plaintiff's alleged claim of title in fee simple to an undivided eight-ninths interest in and to the lands described in Paragraph XXX; in Paragraph XIII with respect to the alleged invalidity of the deed of Arthur M. Brown, dated the 7th day of February, 1903; and in Paragraph XIV with respect to the mortgage executed by the Plaintiff on August 13, 1902.

IV-A

That Paragraph 26 of said bill is multifarious in that it seeks to have the title to the lands quieted, and an accounting for the rents, and also a partition; and furthermore, equity cannot entertain jurisdiction herein for the purpose of quieting the title because the plaintiff is not in possession, nor for an accounting because the bill shows that plaintiff knows the amount that has been paid and received as rent for the land and the account is not complicated or difficult to be tried at law, nor for partition because the bill shows that the legal title is in dispute and has not been adjudicated at law.

V

That it appears in and by Paragraph XXI of said bill that the controversy between said Plaintiff and this Respondent in regard to Plaintiff's claim of title in and to the land described in said bill is now pending and undetermined in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii.

VI

That it appears in and by said bill that in so far as the averments thereof relate to a controversy between said Plaintiff and this Respondent concerning the title to an eight-ninths interest in the lands referred to in said bill, that said claim of title arises under the will of Christian Bertelmann, deceased,

and this court has no jurisdiction to construe said will with respect to any title or claim of title arising under or depending upon the provisions thereof.

VII

That it appears in and by said bill that as to the matters, things and causes averred or sought to be averred in Paragraphs XIII and XIV the Plaintiff has been guilty of such laches and unreasonable delay in asserting rights, if any he had, with respect thereto as to bar him from the relief sought by the bill, and plaintiff is now barred by lapse of time in respect thereof.

VIII

That it appears in and by said bill that the Plaintiff has a plain, adequate and complete remedy at law in so far as the averments in said bill purport to set forth any cause of action against this Respondent with respect to claims to title to said lands arising under the will of said Christian Bertelmann, and as to such this Respondent is entitled to a trial by jury under the Seventh Amendment of the Constitution.

IX

That said bill is vague, uncertain and inconsistent in form and substance, and more particularly is Paragraph XIII inconsistent with Paragraph XVI in that the former purports to aver that neither this demurrant nor her husband, Charles Lucas, ever at any time took possession of the one-ninth interest in

said land which was originally devised to said plaintiff, whereas the averments of the latter paragraph, as well as other paragraphs of said bill, show that this demurrant and the heirs of said Catherine Scott, through their tenant the said Kilauea Sugar Plantation Company, are in possession of the entire land.

The Supreme Court of Hawaii failed to heed the admonition of the Supreme Court of the United States expressed in the case of Bierce v. Waterhouse, 219 U. S. 320, 332, where the court said, "The practice adopted by the Supreme Court of the Territory of passing without deciding other errors assigned upon a judgment is not approved, since it is likely to involve further review proceedings and duplicate appeals. Especially is this so in cases which are subject to the appellate jurisdiction of this court."

The court rested its decision upon only two grounds, namely, multifariousness and a remedy at law. While we have no doubt as to the correctness of the decision upon those grounds, we contend that the other grounds of demurrer should also have been sustained.

The federal equity rules, of course, do not apply here. The English chancery procedure still applies in Hawaii.

The main object of the bill, so far as the Lucas' and Scotts are concerned, is to obtain possession of the land described in the bill, and, so far as McCandless, Aluli and Lane are concerned, the ob-

ject is to have cancelled certain conveyances made to them by the complainant.

The bill shows upon its face that the claims of the Lucas' and Scotts, on the one hand, and McCandless and his associates, on the other hand, are antagonistic as between themselves as well as adverse to the complainant.

The bill seeks primary relief against three sets of defendants, (1) the Lucas', (2) the Scotts, and (3) McCandless, Aluli and Lane, and incidental relief against the Kilauea Sugar Plantation Co., Bishop Trust Co., and The First National Bank of Hawaii.

The relief sought against the Lucas' is (1) cancellation of the Sheriff's deed of February 7, 1903; (2) redemption of the mortgage made by petitioner on August 13, 1902; (3) to remove clouds on the ttile; (4) quieting the title; (5) an accounting for rents collected; (6) the partition of the land in the event that the court should find that the Petitioner as well as the Respondents have interests in the land, and (7) to obtain possession of the land.

In Paragraphs 1 to 8 and 12 of the bill the Petitioner sets forth facts and circumstances showing that there is a controversy between the Petitioner and the Lucas' as to the *legal* title to seven-ninths interest in the land in question which involves a construction of the will of the late Christian Bertelmann and the efficacy of certain tenders alleged to

have been made upon the Lucas' on October 30 and 31, 1916. (Par. 6.)

Paragraph 13 sets forth the execution and delivery of the Sheriff's deed of February 7, 1903; alleges that the deed is void and constitutes a cloud upon the title, that Mrs. Lucas is asserting title to the land under said deed; and Petitioner prays that it be cancelled.

Paragraph 14 alleges that the Petitioner mortgaged the one-ninth interest in said land which vested in him upon the death of his father to Mrs. Lucas on August 13, 1902; that the mortgage has been more than satisfied by the rentals which have been received by her; and that said mortgage, and other mortgages which Mrs. Lucas agreed to pay off, are clouds upon the title; and Petitioner prays that they be cancelled.

In Paragraph 26 the Petitioner says that if the Court should find that the estates which Mrs. Lucas acquired were not divested by the tenders, Petitioner owned and now owns an interest in said lands that he has never sold, and prays the court to determine what his interest is, and for an accounting for the rents, and for a partition of the land. Also, that if the court should find that the Petitioner is entitled to the whole estate he prays that the clouds be removed and that the whole title be quieted in him.

The Petitioner's case against the Respondents McCandless, Aluli and Lane is set forth in Paragraphs

17 to 20 inclusive. It will be observed that the case against those Respondents has no connection whatever with the case against the Lucas'. It relates solely and entirely to certain transactions between Petitioner and those Respondents with which the Lucas' had nothing whatever to do. The claim of the Lucas' arises under the will of Christian Bertelmann, whereas the claims of McCandless, Aluli and Lane arise under certain conveyances made to them by the Petitioner himself.

Paragraphs 9, 10 and 11 state the case against the Scotts which involves the *legal* title to one-ninth interest in the land in question.

Paragraphs 16 and 24 relate to the Petitioner's claim against the Kilauea Sugar Plantation Co.

Paragraph 22 seeks relief against the First National Bank of Hawaii in connection with the money alleged to have been tendered.

Paragraph 23 seeks relief against the Bishop Trust Co. in connection with rents said to have been collected.

Paragraph 21 shows that the controversy between the Petitioner and the Lucas' and Scotts as to the title to the land in question, including the right to possession and damages for the detention is pending in an action of ejectment in the Circuit Court.

The prayers contained in the bill are numerous and include cancellation of instruments, removal of clouds, quieting title, accounting, partition, a decree

"for the possession of the land," and a judgment "for the use or rents of said land."

The outstanding object of the bill, taken as a whole, is to get possession of lands which are now in the possession of the Lucas' and Scotts, together with damages for use and occupation, which, of course, is the usual and appropriate function of an action of ejectment.

ARGUMENT

We will now take up the several grounds of demurrer.

SECOND GROUND

Misjoinder of Parties Defendant

"A bill is multifarious which contains the demand of several matters of distinct and independent natures against several defendants who may be respectively liable, but not as connected with each other. *There must be some connection in interest among defendants against Plaintiff.*" 21 C. J. 422.

"The bill sets out independent causes of action in which the defendants have not a common interest. * * * The defendants Dwinell and Annable ought not to be subjected to the disadvantage and expense of meeting and answering charges of fraud against other persons with whom they have no connection."

Sanborn v. Dwinell, 135 Mass., 236, 237.

"The court is always averse to multiplicity of suits, but certainly a defendant has the right to insist that he is not bound to answer a bill containing several distinct matters relating to individuals with whom he has no connection."

Shields v. Thomas, 18 How., 253,
cited with approval in
Harrison v. Perea, 168 U. S., 311, 319.
"It is a fatal misjoinder in a bill to foreclose a mortgage to join a party claiming adversely to both mortgagor and mortgagee."
Dial v. Reynolds, 96 U. S., 340;
Crosscup v. German S. & L. Soc., 162 Fed., 947.
"There is a misjoinder in a bill brought against defendants acting upon different rights and who are not chargeable with any joint liability or interest in the relief sought."
Elk Brewing Co. v. Neubert, 62 Atl., 782, 783.
"A bill which subjects defendants who are entitled to defend separately to the embarrassments of a suit in which others are joined and there is no common interest is demurrable."
Miller v. Willett, 62 Atl., 178, 182.

We have already pointed out that the claim of the Lucas' arises under the will of Christian Bertelmann, whereas the claims of McCandless and his associates arise under certain conveyances made to them by the Petitioner himself. The Lucas' were not parties to the transaction between the Petitioner and McCandless and his associates. They had no connection therewith and are not interested therein. They object, and have a right to object, to being joined as parties to the controversy between Bertelmann and McCandless. This case, if it ever reaches a hearing, will presumably in the Fifth Circuit, and the Lucas' should not be put to the expense and inconvenience of attending court there while a controversy with which they have no concern is being threshed

out. As shown above, the courts hold that a defendant has the right to insist that he is not bound to answer a bill which contains matters relating to individuals with whom he has no connection; and that he ought not to be required to answer charges of fraud against other defendants with whom he has nothing in common. In the case at bar the Petitioner is seeking to quiet the title to the land in dispute as against the Lucas', and at the same time seeks relief for alleged fraud and failure of consideration against his former associates who are claiming adversely to both the petitioner and the Lucas'. It is analogous to the foreclosure cases above referred to, and the demurrer should be sustained upon the authority of those cases. As between the Lucas' and the other Respondents there is no "joint liability" nor a "common interest" or other "connection." This applies in principle, though to a lesser degree, as between the Lucas' and the Scotts. To be sure, the Scotts also claim title under the Bertelmann will but their one-ninth interest in the lands is separate and distinct from the eight-ninths claimed by Mrs. Lucas, and their respective titles depend on different considerations. The Scotts are not interested in any questions relating to the Sheriff's deed of 1903 or the mortgage of 1902, neither are they interested in the question whether the alleged tenders should have been made to Mrs. Lucas' grantors. On the other hand, the Lucas' are not interested in the question

whether upon the death of Catherine Scott the right of any of the testator's sons to acquire her one-ninth interest expired. In other words, there is no common interest or other connection between the Lucas' and the Scotts—their respective claims are wholly independent of each other and each depends on its own merits.

In connection with this ground of demurrer counsel for the appellant refer to the rule that only those defendants can demur for misjoinder of parties who are improperly joined. (Brief, p. 14). Under that rule the Lucas' have the right to demur on the ground of misjoinder because they have been improperly joined in a suit between the complainant and McCandless and his associates for the cancellation of certain instruments to which they were not parties and in which they have no interet. They are not "necessary" parties to that controversy nor are they "proper", "formal" or "nominal" parties thereto.

Counsel for the Appellant also refer to the elementary general rule that all persons having an interest in the subject matter of an equity suit should be made parties. (Brief, p. 13.) But that does not mean that a complainant may include in his bill two separate and distinct subject matters or controversies between antagonistic groups of individuals (as in this case) and then argue that both groups are properly joined because they are all interested in

one or the other of those subject matters or controversies.

Opposite counsel seem to assume that there is only one subject matter involved here, namely, the land which the complainant seeks to get possession of, and then they take it for granted that all persons who claim any interest in that land may be joined in one suit because they are all interested in that subject matter. That, we submit, is a mistaken view.

The subject matter of a suit is not the physical property whose ownership is disputed, but the controversy as to the title. It is "the nature of the cause of action and of the relief sought" (State v. Muench, 117 S. W., 25, 29), or "the right which one party claims against the other and demands judgment of the court upon." (Reed v. Muscatine, 73 N. W., 579.)

The nature of the causes of action, rights claimed, relief sought and judgment demanded by the complainant against the Lucas' and Scotts and against McCandless and his associates are obviously very different and hence it is clear that those two groups have been improperly joined in this suit and that any member of either group may raise the question of misjoinder.

The case of Pond v. Montgomery, 22 Haw. 241, and other similar cases which involved but a single subject matter, cited in the opposing brief, are not against us and do not sustain the contention of coun-

sel for the Appellant. The case of Scott v. Pilipo, 22 Haw., 252, cited on page 13 of their brief, holds that one who has collected rents from land involved in a partition suit is not a proper party to such suit, and is an authority in our favor.

In the case of Terminal Co. v. Hudnall, 283 Fed., 150, cited by the Appellant, the equitable jurisdiction was sustained on points not appearing in the case at bar, thus, the complainants were in possession, ten actions at law had been brought against them by the defendants, all the defendants based their claims on the same right, and a community of interest existed between them in the questions involved in the controversy. But here, the complainant is out of possession and, as shown by the bill itself, he has in conjunction with McCandless and his associates brought an action of ejectment against the Lucas' and Scotts to get possession, no actions have been brought against the Petitioner by any of the Respondents, and the matter of multiplicity of suits is not involved, and the Respondents in this case have no community of interest in the defense of the case, but, on the contrary, the interests of the two groups are in conflict.

The conflict of interest here referred to cannot be made clearer than by the statement that the Lucas' claim eight-ninths in the land, the Scotts one-ninth, McCandless four-ninths, and Aluli and Lane one-ninth each.

"A bill is multifarious which contains the demand of several matters of distinct and independent natures against several defendants who may be respectively liable, but not as connected with each other. *There must be some connection in interest among defendants against plaintiff.*"

21 C. J., 422;
Swift v. Eckford, 6 Paige, 22;
T. N. Motley Co. v. Detroit Steel Co., 130 Fed., 396;
Bank v. Starkey, 108 N. E. (Ill.), 695;
Carter v. Kimbrough, 84 So. (Miss.), 251.

The matter of misjoinder of parties defendant is closely connected with the subject of multifariousness which we will now discuss.

THIRD GROUND

Multifariousness

"By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting, in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill. In the latter case, the proceeding would be oppressive, because it would tend to load each defendant with an unnecessary burden of costs, by swelling the pleadings with the statement of the several claims of the other defendants with which he has no connection. In the former case, the defendant would be compelled to unite, in his answer and defence, different matters, wholly unconnected with each other; and thus the proofs, applicable to each, would be apt to be

confounded with each other, and great delays would be occasioned by waiting for the proofs respecting one of the matters, when the others might be fully ripe for hearing. Indeed, courts of equity, in cases of this sort, are anxious to preserve some analogy to the comparative simplicity of proceedings at the common law, and thus to prevent confusion in their own pleadings, as well as in their own decrees."

Story, Eq. Pl. Sec., 271.

See also, 21 C. J., 408.

"A bill is multifarious which embraces distinct matters affecting distinct parties who have no common interest in the distinct matters."

Metcalf v. Cady, 8 Allen, 587, 589.

Tested by these definitions it requires no argument to show that the bill in this case is clearly multifarious. We have already pointed out wherein the claims alleged against the Respondents in this case are for separate and distinct matters; that the several Respondents and their respective defences are wholly unconnected and depend on separate proofs; and that it would be oppressive to the Lucas' to require them to answer the bill as it stands and thus be subjected to unnecessary delay and expense.

"It has been said that the application of the rule as to multifariousness is influenced very largely by the circumstances of cases as they present themselves and that it is impossible to lay down any universally applicable rule."

Hawn. Gov't v. Tramways Co., 7 Haw., 683;

Rumsey v. Life Ins. Co., 23 Haw., 142, 147.

That statement is undoubtedly correct. The great variety of circumstances under which the question may arise makes it possible to state only a general principle which shall be applied in a reasonable and common sense manner.

A few cases may be referred to by way of illustration.

"A bill is multifarious which is for partition among the true owners and settlement of their claim against a third party in possession without right."

Bullock v. Knox, 11 So., 339, 340.

"A bill against executors and beneficiaries under a will to have it declared invalid and against one claiming under an alleged deed of the testator is multifarious."

Miller v. Weston, 199 Fed., 104.

"To settle the ownership of corporate stock and to ask relief which depends on such ownership are two disconnected matters which will render a bill multifarious."

Inman v. N. Y. Water Co., 131 Fed., 997.

"A bill to establish complainants equitable title to certain land as against two defendants and to recover damages for breach of contract is multifarious *although all claims related to the same land.*"

Groom v. Wittmann, 164 Fed., 523.

See also,

Marshall v. Means, 56 Am. Dec., 444.

A bill is multifarious where, as in the case at bar, a *legal* demand against some of the defendants is joined with an *equitable* demand against other defendants.

Hudson v. Wood, 119 Fed., 764.

"A bill against separate trustees for an accounting and other relief is multifarious, although the trustees were appointed under the same will."

Carter v. Lane, 18 Haw., 10, 12.

See generally:

Bank v. Southern Seating Co., 92 S. E., 884;
Murrell v. Peterson, 49 So., 31, 34;
Stuck v. Alloy Co., 22 S. E., 592;
Roller v. Clark, 19 App. Cas. (D. C.), 539;
Cecil v. Karnes, 56 S. E., 885.

The multifariousness in this case is more pronounced in the joining of the Lucas' with McCandless and his associates and the First National Bank with whom, the bill clearly shows, the Lucas' have no connection or interest of any kind. Indeed, the claims of those two sets of defendants, as already pointed out, are antagonistic.

"A demurrer to a bill in equity, on the ground of multifariousness, goes to the whole bill, and if sustained, the bill will be dismissed."

Cecil v. Karnes, 56 S. E. (W. Va.), 885;
Muller v. Southern Seating Co., 92 S. E., 884;

We believe that none of the cases cited in Appellant's brief, go so far as to support the bill in this case.

In Castle v. Haneberg, 20 Haw., 123, it was held that a bill is not multifarious where *one general right* is claimed though the defendants may have distinct interests.

But in the case at bar there is not one general right claimed, but separate and unconnected rights are asserted against Lucas et al on one hand and against McCandless et al on the other. Furthermore, the right asserted by the Petitioner in the case cited was *equitable,* whereas in the case at bar the rights set up by Petitioner to at least eight-ninths of the land are *legal rights.*

Rumsey v. N. Y. Life Ins. Co., 23 Haw., 142, was a suit to recover the proceeds of an insurance policy on the life of plaintiff's husband, brought against the insurance company and Benson, Smith & Co., to whom the company had paid the money. The insured and the defendants were all parties to the transaction out of which the suit grew. The court said, (p. 147) :

> "there is an obvious connection between the alleged rights of the complainant against each of these respondents and their presence in the one suit is *necessary* to the determination of the whole controversy."

In that case there was only one controversy, whereas in this case there are three controversies. In that case both the defendants were necessarily joined, one because it had paid the money and the other because it had received it. In the case at bar the Lucas' are not necessary parties to the controversy between plaintiff and McCandless et al, nor are they proper parties thereto, because there is no connection between them.

But in the case at bar an *equitable* claim against McCandless et al has been joined with *legal* claims against the Lucas' and Scotts.

In Curran v. Campion, 85 Fed., 67, it was held that it is sufficient if each party has an interest in some material matters involved *which are connected* with the others.

But in the case at bar there is no connection whatever between the alleged claims against the Lucas' and McCandless et al. They are disconnected and adverse.

In Commonwealth Trust Co. v. Smith, 69 L. ed. U. S. 86, the bill was dismissed for non-joinder of necessary parties, but the reason, as pointed out by the court, was, that "The controversy is not peculiar to the contracts sued on, but reaches and affects all that are outstanding. The contracts, while several in form, are interdependent in substance and operation. * * * In a very substantial sense all the settlers are parties to one general contract * * * the interest of one cannot be defined and adjudged without affecting the interests of all others." Nothing said in that case can be construed to mean that an action to obtain possession of land against one person can be brought in a court of equity because the plaintiff has an equitable controversy against another person concerning the same land.

None of the cases cited are authority for the proposition that where, as in the case at bar, different defendants may be joined between whom there is no joint liability, common interest or other connection, and the relief sought against them is different in character.

The case of Commodores Terminal Co. v. Hudnall, 283 Fed., 150, is copiously quoted from in this connection. We have pointed out above wherein that case differs from this on the facts. The statement made in that case (p. 176) and other cases to the effect that "Multifariousness, therefore, presents a question of convenience, and its application in each case will be governed by practical and not by theoretical considerations," seems to us to be a glittering generality. There are many well considered cases in the books, some of which are cited in this brief, where bills have been dismissed for multifariousness where it would have been more convenient for the complainant to have tried all the questions in one suit. We believe no case has been cited in appellant's brief which holds that on the ground of "convenience" a claim of legal title to land against one defendant can be brought into a court of equity merely because the complainant has an equitable claim against another defendant even though it relates to the same land. The case cited by opposing counsel holds that the matter of convenience is "to be determined in the discretion of the trial court." In the case at bar the

trial court has decided that it would not be convenient to try the different issues set up in the bill in one case.

In 10 R. C. L. 430 it is said among other things, "If the object of the suit *be single,* but it happens that different persons have separate interests in distinct questions that arise out of that *single object,* such persons should be brought before the court in order that the suit may conclude the whole object." But, as stated on Page 433, "A bill will be considered multifarious if the distinct and separate claims made in it are so different in character that the court ought not to permit them to be litigated in one suit." We have pointed out wherein the claims asserted by the petitioner against the two groups of respondents differ in both origin and character.

Counsel for Appellant seem to contend that this bill may be maintained in equity in order to prevent a multiplicity of actions. Pomeroy's Equity Jurisprudence, Sections 243 to 276, is cited. In Section 245 of that work the author defines four classes of cases in which equity will take jurisdiction to prevent a multiplicity of suits. The case at bar would fall, if at all, under the fourth class. In Section 274 Mr. Pomeroy sums up the circumstances under which equity will exercise jurisdiction over the fourth class of cases, and it will be seen that in all of them the defendants must compose a numerous body of persons such as a large number of persons claiming

rights in a fishery, taxpayers, stockholders in a corporation and such like. But in Section 268 it is pointed out that in an ordinary bill of peace, or a suit to quiet title, in order to join a number of defendants there must be between them a "common right," a "community of interest in the subject-matter," or a "common title," and that it is not enough that there is a "community of interest in the question of law or of fact involved, or in the kind and form of remedy demanded."

> "The statement made by the author in Section 269 to the effect that equity will entertain jurisdiction in certain cases where there is no common title or community of right or of interest in the subject-matter has been severely criticized and its incorrectness pointed out."
>
> Tribette v. Ry. Co., 12 So. (Miss.), 32;
>
> Kansas, Etc., R. Co. vs. Quigley, 181 Fed., 190, 196.

In the case at bar, as between the Lucas' and McCandless et al, there is not only no common right or title or community of interest in the subject-matter, but there is no community of interest in the questions involved or in the kind or form of remedy asked.

In 21 Corpus Juris, 73, it is stated that

> "Equity will not take jurisdiction on this ground where there is no necessity for it, as where the legal rules as to joinder of parties and joinder or consolidation of actions permit adequate relief in a single action at law, or where

> for any other reason there is no necessity for a multiplicity of suits to obtain full relief at law, or where a multiplicity of suits would not be avoided. *So a multifarious bill will not be sustained on the ground of preventing a multiplicity of suits.*"

Applying what is there said to the case at bar it appears clearly that this suit cannot be maintained upon the ground sought. So far as the claim of legal title to nine-ninths of the lands devised by the Bertelmann will are concerned it can be made the subject-matter of an action to quiet title at law wherein the defendants will be given their constitutional right to a trial by jury. If the Petitioner feels that his claim against McCandless et al calls for equitable relief he can bring his suit in equity against them, but he cannot bring the Lucas' into that suit on the plea of preventing a multiplicity of suits. There is no "necessity" for joining them in the same suit, for upon the the trial of such a suit the issues between the Petitioner and McCandless et al and those between the Petitioner and the Lucas' would have to be tried just as separately as they would if they were made in separate suits, because the nature of those issues and the evidence concerning them would be entirely distinct and unconnected.

> "A bill in equity is not maintainable for the alleged purpose of avoiding a multiplicity of suits on the plea of saving expense and promoting the plaintiff's convenience *where the effect*

would be to deprive the defendants of a right to a trial by jury."

Boonville Bank v. Blakey, 76 N. E., 529, 536.

Yee Hop v. Young Sak Cho, 27 Haw., 308, 321.

"A party appealing to equity to avoid a multiplicity of suits must steer clear of the vice of multifariousness."

Peniston v. Brick Co., 138 S. W., 532, 535;

Fulton v. Fisher, 143 S. W., 438, 443.

"Plaintiff cannot escape into equity jurisdiction when relatively unsubstantial rights to equitable relief are balanced against the substantial rights of defendants to have the plaintiff's liability to them determined in law, each in his own action."

Empire Eng. Corp. v. Mack, III. N. E., 475, 478.

A suit in equity to obtain possession of land, sought to be maintained on the ground of preventing a multiplicity of suits, will be dismissed where, as here, the defendants can be joined in one action at law. The defendants in such case are entitled to a trial by jury under the Seventh Amendment.

McGuire v. Pensacola Co., 105 Fed., 677.

See generally:

Hale v. Allison, 188 U. S., 56, 6, 71;

Fidelity Trust Co. v. Archer, 179 Fed., 32, 36;

Buchanan Co. v. Adkins, 175 Fed., 692, 701.

Neither can the Petitioner get his case before an equity court on the theory that equity will take jurisdiction of the whole case and administer all the relief, legal or equitable, to which the parties are entitled.

It is only where the legal relief is merely incidental to some established equitable right that equity

will administer the legal relief. On this subject it is stated in 21 Corpus Juris, 140, that

> "The cause must be one presenting matters for equitable cognizance in the first instance which must be both alleged and proved, and the legal matters adjudicated must be germane to, or grow out of, the matter of equitable jurisdiction, and not be distinct legal rights not affected by the adjudication of the equitable questions involved. *The rule does not extend to cases where only some incidental matter is of equitable cognizance, and thereby enable the court to draw in a main subject of controversy which has a distinct and appropriate legal remedy of its own.*"

In the case at bar the Petitioner claims relief against McCandless et al on the ground of fraud and prays that a conveyance made by him to them be cancelled. Then he attempts to bring into that suit in equity legal claims to land against the Lucas' and Scotts and to have them adjudicated notwithstanding that as to them he has an adequate remedy at law, and they are entitled to a trial by jury. It cannot be done as shown by the above quotation from the latest treatise on the subject.

FOURTH GROUND

Multifariousness

We contend that the bill is multifarious also in that it embraces disconnected and independent claims against the Lucas'.

In Paragraphs 1 to 8 and 12 of the bill a claim of legal title to seven-ninths of the land in controversy

is set up and in Paragraphs 13 and 14 a claim of what counsel for the Appellant consider an equitable title to one-ninth is made, and the object is to have the title to the eight-ninths quieted in the Petitioner against the Respondents. In Paragraphs 4 and 12 the Petitioner avers that he is the owner "in fee simple absolute of all estates in and to all said lands and all parts thereof." And in Paragraph 26 the Petitioner seems to think that he and the Respondents Lucas and Scott may be tenants in common, and if so, asks for a partition of the lands.

All this confusion of ideas would tend to embarrass the court in the consideration and determination of the case with reference to the Lucas' and Scotts, not to mention the various claims against the other defendants.

> "Where a complainant alleges want of title, and (admitting title) non-performance, the bill is such as to embarrass the court in administering justice, and is demurrable for multifariousness."
>
> Haw. Govt v. Tramways Co., 7 Haw., 683, 689.
>
> "The bill may be framed with a double aspect, and ask relief in the alternative, but the state of facts on which such relief is prayed must not be inconsistent. The bill must not be multifarious; that is, two distinct grounds of equitable relief, even between the same parties, are not to be joined in one bill."
>
> Guano Co. v. Heatherly, 18 S. E., 611;
> quoted with approval in
>
> Day v. National, Etc., Assn., 44 S. E., 779.

The case at bar is somewhat like the case of The Cherokee Nation v. The Southern Kansas Railway Co., 135 U. S., 41, where the plaintiff sought an injunction to restrain the defendant from locating and maintaining its lines through its territory and prayed that if the injunction should be refused it might be awarded compensation for the lands proposed to be taken, and the court held that the bill was demurrable.

This case also comes within the rule applied in Hurt v. Hollingsworth, 100 U. S., 100, against joining legal and equitable claims in a bill in equity.

The test laid down in Brown v. Guarantee T. & S. Deposit Co., 128 U. S., 403, is a simple one. The court there said:

> "To support the objection of multifariousness, because the bill contains different causes of suit against the same person, two things must concur: first, the grounds of suit must be different; second, each ground must be sufficient as stated to sustain a bill."

This means, of course, that both grounds must be of an equitable nature, and the rule is that such grounds cannot be joined in one bill, if each is different and of itself constitutes a complete suit in equity. But where, as here, a legal claim to seven-ninths of the land is joined with a supposed equitable claim to a one-ninth interest the multifariousness is doubly clear.

GROUND 4-A

Multifariousness

This ground of demurrer is directed against Paragraph 26 of the bill which seeks to remove clouds, to quiet the title, an accounting for rents, and a partition.

There are a number of objections to that paragraph of the bill.

In Tagert v. Fletcher, 83 N. E. (Ill.), 805, it was held that a bill seeking to contest a will, praying partition, specific performance of a contract, and an accounting was multifarious.

In the first place, in order to quiet title to land in equity the plaintiff must be in possession for otherwise he would have an adequate remedy at law by an action to quiet title under the statute (R. L. Hawaii, 1915, Chap. 153) or by an action of ejectment.

> "Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title, and to quiet the possession of real estate, is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff."
>
> Frost v. Spitley, 121 U. S., 552;
>
> U. S. Mining Co. v. Lawson, 115 Fed., 1005.
>
> "It is also objected that, as a bill of peace, or to quiet title, it is defective, because there is no allegation that the complainant was in possession, which is necessary in such a bill. If not in

possession, an action of ejectment would lie."
Boston, Etc., Co. v. Montana, Etc., Co., 188 U. S., 632, 641.

The rule pertains in Hawaii.

Kapuakela v. Iaea, 9 Haw., 555;
Charman v. Charman, 17 Haw., 171.

The titles claimed by the parties to this suit under the will of Christian Bertelmann are legal titles. The Petitioner claims legal title under that will. The bill shows that the Lucas' and the Scotts are in possession of the land and that the plaintiff is out of possession. His remedy, if any, is therefore at law and not in equity.

In the next place, equity has no jurisdiction over an accounting where the account is not complicated.

Equity has jurisdiction "when the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action at law." R. L. Hawaii, 1915, Sec. 2473.

"Equity has concurrent jurisdiction with law in matters of account where from their complexity and length courts of law are incompetent to examine them with the necessary accuracy. But the accounts do not appear to me to be complicated."
Haw. Gov't v. Brown, 6 Haw., 750, 752.
"If no discovery is sought, and no fiduciary relation exists between the parties, equity has no jurisdiction of an action for an accounting unless the accounts are mutual or complicated."
1 Corp. Jur., 618.

The amount of rents for which the accounting is asked is known to the Petitioner and it is easily calculated. The Petitioner says in Paragraph 14 of the bill that the Lucas' have received $8,000.00 per annum less 1/9 paid to the Scotts. The bookkeeper who would testify in a court of equity could give the same testimony before a jury. It is merely a matter of arithmetic.

Thirdly, equity will not entertain a bill for partition of land where the legal title is in dispute.

> "Upon well-accepted principles a plaintiff cannot maintain a bill for partition unless he shows title in himself, and such a title as will establish his right, as against the defendant, to a partition. Where the plaintiff's legal title is disputed, the court of equity declines jurisdiction to try the question, but, in analogy to the case of dower, will retain the bill for a reasonable time, until an action has been brought and the issue of title determined at law."
>
> Gilbert v. Hopkins, 171 Fed., 704, 708.
> quoting Street's Federal Equity Practice.
>
> "A bill for partition cannot be made the means of trying a disputed title."
>
> Bolton v. Bolton, L. R. 7 Eq., 298;
> quoted with approval in
> Clark v. Roller, 199 U. S., 541, 545.
>
> "The title of tenants in common must be conceded and at rest between them, or the court has no jurisdiction to partition the estate."
>
> Wailehua v. Lio, 5 Haw., 519;
> quoted with approval in
> Brown v. Davis, 21 Haw., 327, 329.

In the case at bar we find that the Petitioner in his bill claims the title to all the lands described in Paragraph 30, and in Paragraph 26 he says that if he owns less than the whole he wants the lands partitioned. The bill also shows that the Petitioner's claim of title is disputed by the Lucas', the Scotts and McCandless and his associates, it also shows that his claim of title is disputed by the Kilauea Sugar Plantation Co. Under these circumstances there can be no partition in equity before a cotenancy and the respective interests have been established in an action at law.

If counsel for Petitioner mean to contend that Petitioner could not obtain the relief sought by this bill in an action at law against both the Lucas-Scott group and the McCandless group, we agree with them. The obvious reason is that the relief sought against McCandless and his associates involves a separate controversy, in which the other Respondents are not implicated, and is of a purely equitable nature. But that furnishes no reason for bringing the dispute between Petitioner and the other Respondents into equity to litigate the legal title to the lands. A person who has a legal controversy with certain persons and an equitable one with others cannot expect to have both tried and determined in one suit. The complainant in this case is by no means the only litigant who has found himself in that situation.

FIFTH GROUND

Action pending at Law

"If the declaration, bill or complaint shows on its face that a prior suit is pending between the same parties, the objection in abatement may be taken, both at law and in equity, by demurrer."

1 Corp. Jur., 102.

"The pendency of a prior action may, in equity, usually be pleaded in bar. In this case, as it is alleged in the bill, the court will take notice of it, on demurrer, or on motion; but the effect is not the same as in an action at law. The court will inquire into the matter; and if it appears that the bill embraces the whole subject-matter in dispute more completely than the prior action, they will order the prior action to be discontinued, with costs to the defendant."

Sears v. Carrier, 4 Allen, 339, 341.

"A court of law will not permit a defendant to be vexed at the same time, in the same jurisdiction by the prosecution of two suits for the same cause of action by the same plaintiff. A court of equity will not permit this to be done; but instead of dismissing the second suit, it usually permits the plaintiff to elect which suit he will proceed with, and when the plaintiff has brought an action at law and afterwards a suit in equity, if the plaintiff elects to discontinue the action at law, he usually is permitted to prosecute the suit in equity."

Sanford v. Wright, 164 Mass., 85, 87;

see also:

Spear v. Cogan, 111 N. E. (Mass.), 793;

Laporte v. Scott, 76 N. E. (Ind.), 878.

Paragraph 21 of the bill shows that on January 10, 1918, the Petitioner, together with McCandless, Aluli and Lane, instituted an action of ejectment against the Lucas', the Scotts, Kilauea Sugar Plantation Co., and Bishop Trust Co. to recover the lands in controversy herein, and that the same is now pending in the Circuit Court of the First Circuit.

In that action, of course, the Plaintiff could recover mesne profits in case he should obtain judgment. In other words, leaving aside the relief sought against McCandless and his associates, with which the Lucas' and Scotts have nothing to do, the object of this bill is to secure possession of the lands with damages for their detention. The exact recovery can be obtained completely and adequately in the ejectment action.

The fact that McCandless et al are co-plaintiffs with Bertelmann in the ejectment case makes no difference. So far as Bertelmann is concerned he can discontinue the ejectment case whenever he wants. The cases above cited show that he should have elected which remedy he would pursue. He cannot vex these Respondents with two actions at the same time. If he preferred to prosecute the action of ejectment he could move it on for trial. If he wishes to proceed in equity he should have discontinued the action of ejectment.

It is not an uncommon thing for the defendant in an action at law who has a defense which is not

available in that action to assert his right in a suit in equity and have an injunction against the Plaintiff in the legal action. But that is not the case here. In the case at bar the complainant asks for an injunction against an action at law which he himself began and which he can discontinue (so far as he is concerned) at any time. Counsel say that petitioner cannot discontinue the action at law. Perhaps he cannot dismiss as to his co-plaintiffs, but there is nothing to prevent him from clearing his own skirts by withdrawing himself. His co-plaintiffs cannot prevent that.

The complainant here is trying to vex the defendants (other than McCandless et al) with two suits at the same time concerning the same property. That, the authorities will not permit to be done. Having elected, by not discontinuing the action at law, to retain that action, this bill should be dismissed.

No authority has been cited, and we believe none can be, to the effect that the plaintiff in an action at law can go into equity and ask that his legal action be restrained.

SIXTH GROUND

Construction of will in equity

Paragraph 2 of the bill sets forth three paragraphs of the will of Christian Bertelmann. That will is the foundation of the titles to the lands in

question claimed by the parties to this suit. Upon the proper construction of that will turn at least three questions involved in this case, viz: (1) whether, the plaintiff, having lost his original one-ninth interest by the Sheriff's sale in 1903, had the right to acquire the interests of his brothers and sisters by performing the condition as to payment in 1916; (2) whether, if he had not lost the right, the tender should have been made to the brothers and sisters, and not to Mrs. Lucas; and (3) whether, upon the death of Mrs. Scott, the right to acquire her one-ninth lapsed. In this case the claims of the respective parties, at least so far as eight-ninths of the land are concerned, and, we believe, as to the whole nine-ninths, are of strictly legal titles. This being so the claims must be litigated in a court of law.

> "A court of equity has no jurisdiction to construe a will where, as here, no trust is involved and the claims of the parties are of strictly legal interests in land."
> Paiko v. Boeynaems, 21 Haw., 196, 200.
> also, Estate of Kaiena, 24 Haw., 148.

Counsel say, on page 66 of their brief, "Certainly this Court would not go so far as to say, in a case like this where equitable rights are involved, where the will has already been construed in most particulars, that it would not consider the will as a whole, and add to the construction already made by the

courts should it be necessary to do so in order to give complete relief."

Counsel say, on page 67 of their brief "If Petitioner's theory of his case is correct, Lucas and the Scotts were holding the lands as trustees for his benefit, or as trustees whose trust would determine should he comply with the conditions of the will."

If the alleged tenders to Mrs. Lucas and the Scotts were properly made and thereby the petitioner acquired equiable interests in the land, we concede that a bill to compel conveyances would be in order and that in that case a court of equity could incidentally construe the will in deciding whether the petitioner was a "short-coming" son. But McCandless and his associates would not be proper parties to such a suit since their claims are adverse and disconnected. On the other hand the pending action of ejectment was evidently brought on the theory that the alleged tenders vested the legal title in the Petitioner. If that is correct the Petitioner's remedy is at law and not in equity. We deny, however, that the daughters were trustees for a performing son, and contend that the titles given to the children of the testator were legal titles.

The phrase "to give complete relief" so often used in the brief for the Appellant has a nice convenient sound but we believe that no court has carried the idea to the extent of sustaining a bill like the one at bar. The "equitable rights" which are involved

here are those claimed by the Petitioner against McCandless and his associates, and the fact that the Petitioner claims certain equitable relief against them does not give the court jurisdiction to construe the Bertelmann will in connection with the claim of the legal right to the possession of the land as against the Lucas' and Scotts.

It is true that the will was construed in certain respects in the cases of Bertelmann v. Kahilina, 14 Haw., 378, and Scott v. Lucas, 23 Haw., 338; 239 Fed., 450, which were submissions upon agreed facts, and did not involve the point here discussed, but the questions whether the Petitioner is a "short-coming son," and whether as to the Lucas' the alleged tender was properly made, and whether as to the Scotts the right to make any tender had lapsed, were not decided in those cases. Those questions relate solely to the *legal* claims of title asserted in the bill against the Lucas' and Scotts and have nothing whatever to do with the *equitable* claims asserted against McCandless et al. In short, the rule that "equity has no jurisdiction to construe a will where no trust is involved and the claims of the parties are of strictly legal interests in land" directly applies to the case at bar.

On page 79 of their brief, counsel for the Appellant point out a distinction between an estate upon condition and a conditional limitation. Mrs. Lucas, as the grantee of the several daughters of the tes-

tator took whatever the daughters had to convey. It seems to us that the estates of the daughters were conditional limitations. But if they were estates upon condition, then, upon the law cited in the Appellant's brief, the Petitioner should have made an entry in order to defeat them. No entry is alleged in the bill.

SEVENTH GROUND

Laches

Paragraph 14 of the bill shows that on August 13, 1902, the Petitioner mortgaged to Mrs. Lucas all his right, title and interest in and to the lands in question (which was one-ninth) to secure the payment of $9845 in three years with interest at the rate of ten per cent per annum, and alleges that the mortgage has been more than satisfied by the moneys (i. e., rents) collected by Mrs. Lucas, also that the Petitioner "has never parted with the one-ninth interest in said land which vested in him upon the death of his father." Paragraph 13 of the bill, however, shows that on February 7, 1903, the High Sheriff sold to satisfy a judgment all the Petitioner's interest in the lands in controversy "describing the same as a one-third interest." As Bertelmann owned only a one-ninth interest the deed was good, of course, only to convey what he did own. It is averred that the deed was void because the Petitioner was absent from the Territory and had no notice, and because the consideration paid was grossly in-

adequate, but that Mrs. Lucas is asserting title under it. It is alleged that the mortgage and deed are clouds upon the title claimed by the Petitioner and he prays that they be cancelled.

We contend that the Petitioner is barred by his laches with reference to the deed and mortgage.

> "Laches in a general sense is the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done."
> 21 Corp. Jur., 210.
> "It is an inherent doctrine of equity jurisprudence that nothing less than conscience, good faith and *reasonable diligence* can call courts of equity into activity and that they will not grant aid to a litigant who has negligently slept on his rights and suffered his demand to become stale where injustice would be done by granting the relief asked. It is therefore a general rule that laches or staleness of demand constitutes a defense to the enforcement of the right or demand so neglected."
> 21 Corp. Jur., 212.
> "In some cases long lapse of time has been held sufficient of itself to prevent relief. But mere delay in asserting a right does not ipso facto bar its enforcement in equity by the great weight of authority, unless the case is barred by the statute of limitations."
> 21 Corp. Jur., 221.
> "While statutes of limitations as enacted in some states apply by force of their own terms as well to suits for equitable relief as to actions at law, yet as ordinarily enacted they do not in terms apply to suits in equity; and accordingly,

where the right sought to be enforced in such a suit is purely equitable in character, and there is no corresponding legal right or remedy, there is nothing to which the statute can apply, by analogy or otherwise, and therefore it does not govern. But where there is a corresponding legal right or remedy, although equity may have exclusive jurisdiction over the enforcement of the right, courts of equity will apply the statute by analogy."

21 Corp. Jur., 251.

As to the Sheriff's deed. If, as alleged in Paragraph 13 of the bill, that deed was "void," it passed no title, does not constitute a cloud on the title, and does not affect anyone's rights in the premises. If that deed was merely voidable and can be cancelled only by a court of equity, then the Petitioner's right to have it set aside accrued the moment the deed was delivered, namely, on February 7, 1903—over nineteen years ago. But no court, either of law or of equity, will permit a party to sleep on his rights for any such length of time. The period of limitation for asserting legal rights to land (ten years in Hawaii) will be applied in equity unless under special circumstances the right may be barred by the lapse of a shorter period.

"The analogy of the statute of limitations applicable to the corresponding legal remedy is generally followed in fixing the time in excess of which delay will not be excused."

9 Corp. Jur., 1204.

"Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted."

Grymes v. Sanders, 93 U. S., 55, 62.

"In cases of concurrent jurisdiction, the federal courts, sitting in equity, consider themselves bound by the statutes of limitation which govern courts of law in like cases, and this is rather in obedience to the statute of limitations than by analogy. In many other cases they act upon the analogy to the statute, and they will not be moved to set aside a fraudulent transaction at the suit of one who has been quiescent during a period longer than that fixed by the statute of limitations after he had knowledge of the fraud, or after he was put upon inquiry with the means of knowledge accessible to him."

Rugan v. Sabin, 53 Fed., 415, 420.

"Courts of equity in cases of concurrent jurisdiction consider themselves bound by the statute of limitations which govern actions at law."

Met. Nat. Bank v. Dispatch Co., 149 U. S., 436, 448.

"At law, fraud must be taken advantage of within six years of its discovery. Where, however, an equitable action must be brought, by analogy a court of equity will follow the period fixed in law cases by statute."

Du Pont v. Du Box, 29 S. E. (S. C.), 665, 668.

Upon the facts averred in the bill it must be held that the plaintiff's cause of action arose and time began to run against him from the date of the delivery of the Sheriff's deed, and that he is now barred by his laches.

Lee v. Hoover, 124 N. E. (Ind.), 783;
De Martin v. Phelan, 51 Fed., 865.

"Where an administrator purchased land sold under foreclosure sale in his own name and claimed title under a Sheriff's deed, a suit to set aside the deed to quiet the title, and for an accounting for rents was held barred by a delay of nine years."

Stianson v. Stianson, 167 N. W. (S. D.), 237, 241.

"The rights even of co-tenants may be lost under such circumstances."

Stevenson v. Boyd, 96 Pac. (Cal.), 284;
Savage v. Bradley, 43, So. (Ala.), 20;
Smith v. Mill Co., 13 Haw., 716.

In the case at bar, however, when the equity of redemption was purchased at the execution sale by Mrs. Lucas, the mortgage became merged in the fee and thereafter she was the sole owner of the entire title to Frank Bertelmann's one-ninth interest in the land.

"It is a general rule that when the legal title becomes united with the equitable title, so that the owner has the whole title, the mortgage is merged by the unity of possession."

1 Jones on Mortgages, Sec. 848.

"When a mortgagee buys the mortgaged property at a sheriff's sale under a judgment he acquires an absolute title to the property."

Harrison v. Roberts, 6 Fla., 711.

We contend therefore that if the Petitioner ever did have a right to attack the Sheriff's deed on the ground of fraud or the inadequacy of consideration he has lost that right by sleeping on his rights for so many years.

As to the mortgage. The same line of reasoning applies to the mortgage. Even if the mortgage had not gone out of existence through being merged in the deed, the time to redeem it has long since passed. Just as the mortgagee's right to foreclose a mortgage may be barred by the period prescribed by the statute of limitations for the recovery of land, so will the right of the mortgagor to redeem a mortgage be lost by the like period.

The case of Hilo v. Liliuokalani, 15 Haw., 507, was a suit to restrain the foreclosure of mortgages. The court there said:

> "The remedy at law against the land, however, would be barred by the period applicable to real actions, and while, strictly speaking, the statute is not applicable to suits in equity, yet equity follows it by analogy. * * * To prevent foreclosure it was not necessary that the Plaintiff mortgagor should have given notice to the defendant mortgagee that she claimed adversely. Mere lapse of time, the mortgagor being in possession, and non-payment on account of interest or principal, in the absence of other recognition of the mortgagee's claims or rights, is sufficient to raise a presumption of payment after the lapse of the statutory period applicable to real actions."

See also, Kipuhulu S. Co. v. Nakila, 20 Haw., 621.

"Such also is the doctrine of the Supreme Court of the United States."

Piatt v. Bank, 9 Pet., 405, 415.

It has also been decided that a mortgagor cannot redeem the mortgage after the statutory period for the recovery of land has elapsed.

Slicer v. Bank of Pittsburgh, 16 How., 572, 580;

Batchelder v. Bickford, 104 Atl. (Me.), 819.

In Dixon v. Hayes, 55 So. (Ala.), 164, the court said:

"Where the mortgagee, after the law day of the mortgage, has been in possession of the subject for a period of 10 years, without an account for rents and profits, or other recognition of the equity of redemption remaining in the mortgagor, or in his privies, the right of the mortgagor, or of his privies, to redeem is finally barred."

In Lucas v. Skinner, 70 So. (Ala.), 88, it was held that after a lapse of less than 17 years, where the mortgagee had collected the rents under an agreement that he would not foreclose, the mortgagor's administratrix was denied the right to redeem and for an accounting on the ground of laches independently of the statute of limitations. That case seems to be directly in point.

The bill in this case shows that with respect to his claims as to the deed and the mortgage the Petitioner has delayed action beyond the period of the statute of limitations, and shows no legal ex-

cuse for the delay. Under such circumstances his laches must be held to be shown by his own averments.

> "Where, on the face of the bill, it appears that there has been an unreasonably long delay in instituting the suit so that apparently Plaintiff has been guilty of laches, the bill must by specific averment account for and excuse the delay."
>
> 21 Corp. Jur., 401;
> Richards v. Mackall, 124 U. S., 183;
> Hart v. Heidweyer, 152 U. S., 547, 558;
> Hendryx v. Perkins, 114 Fed., 801, 811;
> Dustin v. Brown, 130 N. E., 859, 864.
>
> "While courts of equity are not bound by, they ordinarily act or refuse to act in analogy to, the statutes of limitations relating to actions at law of like character. When a suit is brought after the time fixed by the analogous statute, the burden is on the complainant to plead and prove that it would be inequitable to apply it to his case, and when a suit is brought within the statutory time for the analogous action at law, the burden is on the defendant to show either from the face of the bill or by his answer that extraordinary circumstances exist, which require the immediate application of the doctrine of laches."
>
> Boynton v. Haggart, 120 Fed., 819, 830.

In the case at bar, as above pointed out, the laches appears on the face of the bill, and, as shown by the cases above referred to in this section of this brief, whether the statutory period of time is to be applied, or whether the facts shown by the bill be

considered strictly from the equitable standpoint of laches independently of the statute, the result will be the same.

Opposing counsel properly say in their brief that in equity there is no arbitrary time prescribed for the operation of the doctrine. The correct rule was clearly stated in Boynton v. Haggart, supra, and followed by the Circuit Court of Appeals for the Ninth Circuit in Smith v. Smith, 224 Fed., 1, 6, to the effect that when suit is brought after the time fixed by the statute of limitations the burden is upon the complainant to *plead and prove* that it would be inequitable to apply it to his case. The bill in this case contains no averment whatever to show that the statutory period should not be applied here.

The principle of the federal courts was recognized ~~by this court~~ in Hawaii in the case of Magoon v. Lord-Young Co., 22 Haw., 327, 350 (cited in Appellant's brief, p. 43) wherein it was held that where equitable relief is sought in support of a legal right "mere delay unaccompanied by circumstances constituting an estoppel will not defeat the remedy *unless it has continued so long as to defeat the right itself.*" In the case at bar the right itself has been defeated by the delay of more than the statutory period of ten years.

Counsel for the Appellant point out (brief, p. 42) that the mortgage contained a provision to the effect that until default the mortgagor, his heirs and

assigns, may hold and enjoy the premises, but the bill of complaint, all the way through, shows that the Defendants, Lucas and Scott, through their tenant the Kilauea Sugar Plantation Co. are in possession of the entire property.

In Paragraph 4 of the bill Petitioner claims to be "entitled to the possession" of the land. In Paragraph 14 the Plaintiff says that the Lucas' "are liable to Petitioner for the full value of the use and occupancy of said land which they have ever since said time *withheld from* Petitioner." In Paragraph 16 Petitioner says that the Kilauea Sugar Plantation Co. "have been in possession of said land, during all time since the same became the property of petitioner * * * and said Respondent have been enjoying the use of said lands." The agreement between Petitioner and McCandless et al recited that the object was that the Petitioner might "recover and be in possession" of the land. In Paragraph 18 it is alleged that Aluli and Lane agreed to prosecute Petitioner's rights and "get possession" of the land. In Paragraph 20 Petitioner alleges that McCandless et al neglected to take any steps to carry out their agreement "to put Petitioner in possession of his said lands." In Paragraph 21 Petitioner alleges that an action of ejectment was instituted against the Lucas' and Scotts "to recover the lands in controversy." In Paragraph 24 it is alleged that the Kilauea Sugar Plantation Co. "are occupying

and using said land under an agreement or lease of some kind with or from one or more of the Respondents, and they and said Respondents are making use of their possession," etc. In Paragraph 13, it is averred that Mrs. Lucas "is asserting title to said land against Petitioner" under the Sheriff's deed of February 7, 1903. And the Complainant prays for a decree "for the possession of his land."

It is worse than useless, therefore, for counsel to contend that the Appellant is in possession of one-ninth or any portion of the land, or that he is a tenant in common with the Lucas' and Scotts.

EIGHTH GROUND

Remedy at Law

"It is fundamental that equity will not take jurisdiction of a controversy where the plaintiff has an adequate remedy at law."

Hipp v. Babin, 19 How., 271;

Equitable Society v. Brown, 213 U. S., 25, 50;

Wehman v. Conklin, 155 U. S., 314, 323.

"Under the Seventh Amendment of the U. S. Constitution which is in force in this Territory (Bannister v. Lucas, 21 Haw., 222, 229) parties are entitled to a trial by jury in actions involving legal claims to land."

"And the statute of Hawaii (R. L. 1915, Sec. 2473) gives jurisdiction to the circuit judges in equity only when there is not a plain, adequate and complete remedy at the common law."

Makainai v. Lalakea, 24 Haw., 268, 272.

"Where the controversy involves merely the legal title to lands there is an adequate remedy

at law and the case is not one for the jurisdiction of a court of equity."

21 Corp. Jur., 62.

"The jurisdiction in respect to titles to real estate is in courts of common law."

Kaaimanu v. Kauwa, 3 Haw., 610, 612;

Kapuakela v. Iaea, 9 Haw., 555.

"Where the complainant in a bill in equity to recover real estate is out of possession, alleges that the defendants are in possession by force and fraud and prays for the removal of clouds upon his title, he cannot maintain his action on the plea of preventing a multiplicity of suits where the defendants can be joined in one action at law."

McGuire v. Pensacola Co., 105 Fed., 677.

The bill in this case shows on its face that the Lucas' and Scotts and the Kilauea Sugar Plantation Co. are in possession of the land in dispute, and that they can be and have, in fact, been joined as defendants in one action of ejectment. In an action at law to quiet title also those defendants could all be joined under the provisions of the statute (R. L. Hawaii, 1915, Chap. 153) which allows Plaintiffs whether in or out of possession to join as Defendants all other persons who claim interests in the land, and in such a proceeding the parties are accorded their constitutional right to a jury trial.

Kahoiwai v. Limaeu, 10 Haw., 507;
Mossman v. Dole, 14 Haw., 365, 369;
Lahaina Agl. Co. v. Poaha, 18 Haw., 494;
Paiko v. Boeynaems, 22 Haw., 223, 237.

We do not contend, as opposing counsel seem to think, that the giving to courts of law jurisdiction in actions to quiet title to land irrespective of who is in possession has taken from the courts of equity any jurisdiction possessed by them. Where, as here, the Petitioner is out of possession, equity would have no jurisdiction whether the statute had been enacted or not.

If, as alleged in the bill, the deed of the High Sheriff was void its nullity can be shown in an action at law as well as in a suit in equity.

> Palau v. Halemano Land Co., 22 Haw., 357; 361;
> Dee v. Foster, 21 Haw., 1.
> "An owner of land has a plain, adequate and complete remedy at law against one in possession claiming under a void deed."
> Whitehead v. Shattuck, 138 U. S., 146;
> Smyth v. Canal Co., 141 U. S., 656.

In Paragraph 13 of the bill the Petitioner avers that the sheriff's deed is void for several reasons, and that it constitutes a cloud upon his title. But, as above pointed out, a void deed passes no title and there is no need of equitable relief because the remedy at law against such a deed is plain, adequate and complete.

In Paragraph 14 of the bill the Petitioner avers that the mortgage on his one-ninth share in the land "has been more than satisfied by the moneys belonging to Petitioner" and the Complainant prays

that Mrs. Lucas be required to account for the balance due him. That being so, the lien has been satisfied, and there is nothing but the statute of limitations to prevent the Petitioner from obtaining relief at law so far as that mortgage is concerned. It is not true, as contended by opposing counsel, that an accounting for the rents received can be had in equity, because the recovery could as well be had in an action of ejectment.

> "It is well settled that the right of trial by jury secured by the Constitution cannot be impaired by joining with a claim cognizable at law a claim for equitable relief."
> Scott v. Neely, 140 U. S., 106;
> U. S. Mining Co. v. Lawson, 115 Fed., 1005;
> Bearden v. Benner, 120 Fed., 690;
> N. J. L. & L. Co., v. Lumber Co., 190 Fed., 861, 869.

The fact that Petitioner may have an equitable claim against McCandless and his associates does not authorize the Petitioner to sue the others in equity.

Counsel for Appellant cite a number of cases in support of the proposition that where jurisdiction has once been properly assumed a court of equity may retain jurisdiction even though in so doing it may decide questions not of equitable jurisdiction.

We do not dispute that as a general principle, but the question here is not what a court of equity may do *after* it has properly taken jurisdiction, but when can it *properly take* jurisdiction.

Counsel cite the case of Terminal Co. v. Hudnall, 283 Fed., 150 and Camp v. Boyd, 229 U. S., 530, in support of the proposition that where a purely equitable title is claimed, which is not available at law, equity will take jurisdiction and restrain the action at law.

We have already pointed out that the bill in the Hudnall case was sustainable because the complainants were in possession, and for the purpose of avoiding a multiplicity of suits, as several had been commenced and more were threatened. But what is more important, in this particular connection is that the titles claimed by the complainants in that case were equitable titles.

In Camp v. Boyd, the defendant had instituted against the complainant an action of ejectment for an entire lot which was made up of three pieces under three different titles. The complainant was in possession of the entire lot and had the legal as well as the equitable title to one of the pieces but only the equitable title to the other two. It is obvious that in the action of ejectment the Defendant (Complainant in equity) would have been defeated as to two of the pieces. The Complainant was entitled, of course, to go into equity as to those two pieces, and as to the piece to which he had the legal title, he was entitled to go into equity because he was in possession. He was entitled to have the action of ejectment restrained for the additional reason that it had been brought for the reocvery of the entire lot.

The two cases referred to, therefore, are easily distinguishable and are not in point.

Even if the Petitioner were obliged to go into equity with reference to the status of the deed and mortgage which relate to only a one-ninth interest, he could not drag into equity the controversy in regard to the legal title to the other eight-ninths.

> "It is quite true, as held by the learned judge below, that equity, having acquired jurisdiction of a case, may decide all matters incidentally connected with it, so as to make a final determination of the whole subject; but this rule does not extend to a case where only some incidental matter is of equitable cognizance, and thereby enable the court to draw in a main subject of controversy which has a distinct and appropriate legal remedy of its own."
>
> Graeff v. Felix, 49 Atl. (Pa.), 758.
>
> Legal remedies will be applied in equity only where they are incidental to some main subject of equitable jurisdiction and for the purpose of completing the relief.
>
> "A court of equity in this state can deal with legal questions only so far as their decision is incidental or essential to the determination of some equitable question."
>
> Stout v. Assur. Co., 56 Atl., (N. J.), 691, 694.
>
> "Counsel for Appellant has collated a multitude of cases in suppport of the proposition that when a court of equity once acquires jurisdiction it will go on and administer complete justice between the parties over the subject-matter in issue between them, will even adjudge damages and enforce payment. That is very true, but it only does so in support of and under and in furtherance of its chancery jurisdic-

tion, and to enforce an equitable right, and when the money demanded arises under such circumstances as bring it within the equity jurisdiction of the court. It cannot usurp the functions of a court of law."

Fowles v. Bentley, 115 S. W. (Mo.), 1090, 1097.

"As to the other averments which it is claimed confer jurisdiction in equity, it is only necessary to say that charges of fraud and conspiracy and prayers for injunction and the cancellation of deeds as a cloud on title do not confer jurisdiction in equity, when the bill, taken as a whole, shows that the remedy at law is complete and adequate. If it were otherwise, a defendant could be deprived, by a mere form of pleading, of the constitutional right to a trial by jury which he has in all suits at common law where the value in controversy shall exceed twenty dollars."

Marthinson v. King, 150 Fed., 48, 54.

As already pointed out, the joining of legal and equitable claims renders a bill multifarious.

Twenty-third St. R. Co. v. Ray Co., 177 Fed., 477;

Mesisco v. Guiliano, 190 Mass., 352;

Saltman v. Nesson, 201 Mass., 534, 539;

Polckzek v. Ins. Co., 91 Atl. (N. J.), 812.

FIRST GROUND

No Equity in the Bill

From what has been said we think it is entirely clear that as to Petitioner's claim against the Lucas' as to seven-ninths interest in the land it is purely and simply legal in nature, and as to which the Petitioner has a plain, adequate and complete rem-

edy at law and the defendants are entitled to a trial by jury. We also believe that as to the other one ninth interest which was the subject of the mortgage and the sheriff's deed, the mortgage alleged to have been satisfied, and the deed alleged to be void, the complainant likewise has a plain, adequate and complete remedey at law either in ejectment or a statutory action to quiet title. But even if the Petitioner's remedy as to the one-ninth is in equity that cannot be allowed to drag the litigation as to the seven-ninths into equity also. The tail cannot wag the dog. Neither can the fact that the petitioner has equitable claims against McCandless et al be used to deprive the Lucas' and Scotts of their constitutional right to trial by jury.

If the sheriff's deed was merely voidable the Complainant has lost his equitable remedy to have it set aside by his laches. And, as to the mortgage, as heretofore shown, his right to redeem has also been lost by laches. So that there is nothing to litigate as between the Lucas' and Petitioners but the legal controversy with reference to the remaining seven-ninths interest in the land.

So far as Appellant's controversy with McCandless and his associates is concerned the Lucas' are not interested.

It is indisputable that the controversy between the Petitioner and the Lucas' as to the seven-ninths

involves a plain dispute over the legal title arising under the will of Christian Bertelmann. And the bill shows that even as to those seven-ninths the Petitioner has failed to obtain them because he had previously lost his right to acquire his brothers' and sisters' interests by reason of his having lost his own one-ninth through the execution sale. Christian Bertelmann said in his will, "It is my sincere wish and *will* that my lands shall befall in equal shares and interest upon my three sons." Frank Bertelmann, by his improvidence, had lost his original interest and thus defeated his father's intention. The testator did not intend that a defaulting son should take from his brothers and sisters their shares in the land at a figure far below their actual values for the benefit, not of himself, but for the profit of McCandless, Aluli and Lane. In other words, when the Petitioner let his own interest in the land slip through his fingers he became a "short-coming" son within the meaning of the will.

Furthermore, as pointed out by the Supreme Court in Scott v. Lucas, 23 Haw., 338, 342 and by the Court of Appeals in 239 Fed., 450, 457, the interests in the land given to the brothers and sisters were vested estates subject to be defeated by the performance of a condition. That condition was to be performed by the payment of any son who was not "short-coming" of the sum of $5000 to each of the "surviving daughters" and "short-coming son or sons" personally, and not to their assigns. A

condition subsequent, such as this must, of course, be performed *strictly.* The tenders alleged to have been made to the Lucas', therefore, were made to the wrong persons and did not have the effect of transferring the title to the Petitioner.

By the third article of the will of Christian Bertel mann any son who was not "short-coming" could acquire the interests of the daughters and "short-coming" sons by paying them $5000 each. The right to acquire such interests was, by the terms of the will, a personal right. By the fourth article of the will it was provided that if the land should be sold or leased again the money derived from such sale or lease "will be equally divided amongst my children *or their lawful heirs and assigns.*" But in the third article the testator provided that in order to defeat the estates of the daughters and short-coming sons there should be paid the sum of $5000 "to each of my daughters or surviving daughters" and "to my short-coming son or sons." The testator did not say "to each of my daughters and short-coming sons, *or their heirs or assigns,*" and the difference in phraseology is very significant. If the testator had not cared whether the sons would have the land he would not have made the provision as he did. He certainly did not wish his daughters' estates to be defeated by land speculators or contingent fee lawyers.

The bill of complaint, on its face, shows that the Petitioner was not trying to acquire his brothers' and sisters' interests for himself in order to carry out the wish of his father. He had lost his own interest through his improvidence, and the scheme in making the alleged tenders was for the purpose of acquiring the land for the benefit of strangers to the family. Being in default, and unable to carry out his father's desire, the Petitioner was a "short-coming" son within the meaning of the will, and the will gave no right to such a son to acquire any interest from any of the daughters.

The word "short-coming" is defined in the Standard Dictionary as "A failure of full performance; remissness in duty; delinquency"; and in Webster's as of "Neglect of, or failure in, performance of duty."

Industry and thrift on the part of the sons was what the testator had in mind. The bill shows that the Petitioner failed of full performance of what his father declared to be his "wish and will"; that he was remiss in duty, neglectful and delinquent.

The testator's intention clearly was that the payments of $5000 should be made by the son or sons personally to the daughters and short-coming sons personally. Only in that way could a son who was not short-coming comply with the condition prescribed by the testator.

Nothing that Mrs. Lucas might have said or done, nothing that the Petitioner or his counsel might wish, could alter the terms prescribed by the testator in his will, and upon the observance of which only, could the estates of the daughters and short-coming sons be defeated.

Each child having been given a vested estate in one-ninth of the land any son or daughter could sell and convey his or her ninth interest, but the purchaser would take it subject to the right of any son who was not "short-coming" to defeat the estate by paying the vendor, within the prescribed time, the sum of $5000. What should be done with the money after it was paid would be a matter of agreement entirely between the vendor and purchaser. The son who paid the money would not have to worry about that. It would be none of his business.

> "The circumstance of an estate being subject to a condition does not affect its capacity of being aliened, devised, or descending, in the same manner as an indefeasible one, the purchaser or whoever takes the estate by devise or descent taking it subject to whatever condition is annexed to it."
>
> 2 Washb. R. P. (4th Ed.), p. 23.
>
> "The owner of a determinable fee in real estate has all the right of an owner in fee simple in regard to the use or disposal of the real estate. * * * and if he should sell, his purchaser would also take a determinable fee."
>
> Hillis v. Dils, 100 N. E. (Ind.), 1047, 1049.

The rights and liabilities of the testator's sons and daughters were not created by any agreement among themselves, but were defined and limited by the terms of the will which, of course, cannot be changed.

This phase of the case really settles the whole controversy and shows that there is no equity in the bill.

On Page 58 of their brief counsel for Appellant point out that the mortgagor covenanted "not to suffer or do any act or negligence" whereby the premises shall become liable to attachment or whereby the security shall become impaired, and that in the event of foreclosure the mortgagee could retain "all advances and expenditures made necessary by any default of the mortgagor." The covenant referred to was the covenant of the mortgagor, not that of the mortgagee, and it imposed no duty or obligation on the mortgagee.

> "The relation between them (mortgagor and mortgagee) is not so far analogous to that between trustee and cestui que trust as to preclude the mortgagee's purchasing. The real reason why a person standing in the relation of trustee cannot purchase from his cestui que trust is, that he cannot purchase that which he has to sell. He has a duty to perform as a trustee, in selling for the best advantage of his beneficiary; and this is inconsistent with his personal interest to obtain the property on terms advantageous to himself. But there is

no trust relation between the mortgagor and the mortgagee. The mortgagee is under no obligation to protect the equity of redemption. * * * In the absence of fraud, undue influence, or confidential relations, the mortgagee may purchase the equity of redemption of the mortgagor, upon the same footing that any other person may purchase it. * * * The general rule, therefore, is that the mortgagee may acquire the equity of redemption either directly from the owner, or at a sale by his assignee in bankruptcy, *or by his ceditor upon execution.* He may acquire any title adverse to the mortgagor, whatever it may be, and set it up against his claim to redeem."

1 Jones on Mortgages (6th Ed.), Sec. 711;
Blythe v. Richards, 10 S. & R., 261;
Harrison v. Roberts, 6 Fla., 714;
Francis v. Sheats, 45 So. (Ala.), 241.

"The fact that the mortgagee is in possession does not change the rule. By taking possession he does not become a trustee except in a limited sense."

Grifin v. Marine Co., 52 Ill., 130, 144.

The contention is made that Mrs. Lucas and the Petitioner were tenants in common. Such, we submit, was not the case. Neither were the Bertelmann children "tenants in common by descent." Mrs. Lucas owns eight-ninths of the land and the Scotts own the other one-ninth. Furthermore, there is no trust relation between tenants in common, and it is well settled that one may acquire title by adverse possession against the other.

Nahinai v. Lai, 3 Haw., 317;
Smith v. Hamakua Mill Co., 13 Haw., 716;
Aiona v. Coffee Co., 20 Haw., 724.

The purchase through the sheriff's deed, in which the mortgage merged, was an ouster of the Petitioner, and the possession thereunder of Mrs. Lucas has always been adverse to the Petitioner whether the deed was void or voidable.

The Appellant (brief, p. 125) relies on the case of Sharon v. Tucker, 144 U. S., 533. But that case, as an examination of it will show, bears no resemblance to the case at bar. There, it appears, neither party had actual possession of the land. The Complainants had acquired title by adverse possession but had no evidence of that. The Respondents had the paper title but recognized the title claimed by the Complainants. The court took particular pains to point that out, saying:

"There is no controversy such as here stated in the present case. The title of the Complainant is not controverted by the defendants, nor is it assailed by any actions for the possession of the property, and this is not a suit to put an end to any litigation of the kind."

And further on, the court said:

"There is no controversy here as to the title of the complainants."

And again, the court said:

"As the complainants have the legal title to the premises in controversy, and as no parties deriving title from the former owners can contest that title with them, there does not seem

to be any just reason why the relief prayed for should not be granted."

If, in that case, the Defendants had been in posession and disputed the title of the Complainants the bill would have been dismissed because the Complainants would have had an adequate remedy in an action of ejectment.

Again, if it had appeared in that case, that the Complainants, or their predecessors in interest, had established their title by adverse possession by a judgment of a court of law the bill would have been dismissed because that judgment would have been evidence of title.

In the case at bar, unlike Sharon v. Tucker, the title is in dispute. In this case, unlike that case, the Respondents are in possession of the land and the Complainant is out of possession. The Complainant's remedy, if his claim of title is good, is by an action of ejectment in which the Respondents will be accorded their constitutional right to a trial by jury.

Sharon v. Tucker is not inconsistent with other cases decided by the Supreme Court in which it has been uniformly held that where the claimant of land is out of possession he has an adequate remedy at law against the party who is in possession.

If the Complainant in the case at bar has a good title to the land in question he can prevail in an action of ejectment against the Lucas,' the Scotts and

the Kilauea Sugar Plantation Company and the judgment in that case would be his evidence of title. He would not need to resort to a court of equity as did the Complainant in Sharon v. Tucker under the peculiar circumstances of that case.

We contend that the demurrers of these Respondents should be sustained on each and all the grounds therein stated, and that the decree appealed from should be affirmed.

Respectfully submitted,

ROBERTSON & CASTLE,
A. G. M. ROBERTSON,
Attorneys for Mary N. Lucas and Charles Lucas, Appellees.

NO. 4481

United States Court of Appeals

FOR THE

NINTH CIRCUIT

FRANK C. BERTELMANN,

Petitioner-Appellant,

vs.

MARY N. LUCAS, et al,

Respondents-Appellees.

REPLY BRIEF

On Behalf of Respondents John C. Lane and Noa W. Aluli.

Upon Appeal from the Supreme Court for the Territory of Hawaii.

NOA W. ALULI,
in propria persona,
and for Respondent
JOHN C. LANE.

Filed this.....day of.....,
1925.

F. D. MONCKTON, Clerk,

By ....., Deputy Clerk.

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No. 4481

United States Court of Appeals

FOR THE

NINTH CIRCUIT

FRANK C. BERTELMANN,

Petitioner-Appellant,

vs.

MARY N. LUCAS, et al,

Respondents-Appellees.

REPLY BRIEF OF RESPONDENTS LANE AND ALULI.

Upon Appeal from the Supreme Court for the Territory of Hawaii.

I.

STATEMENT.

a. Petitioner alleges he was in a great need of $40,000.00 with which to make the payments prescribed by the conditions of the will—"if he should fail to make the payments he would lose his rights granted by his father's will to acquire an estate for $40,000.00, worth at that time at least $800,000.00 and more nearly $1,250,000.00." (Tr. p. 34.)

b. Petitioner alleges:

He did not have the $40,000.00.

He was one year trying to raise the $40,000.00 and failed.

He applied to Respondent Lane for assistance and after "endeavoring to get various persons to lend the money to your petitioner," he, too, failed to raise the much needed $40,000.00. (Tr. pp. 28-29.)

c. Petitioner alleges that Respondent Aluli "undertook to obtain the $40,000.00" and he (Aluli) succeeded with Respondent McCandless. (Tr. p. 29.)

d. Petitioner alleges that on October 30, 1916, he entered into an agreement with Respondents Lane and Aluli, because Aluli had secured the tendering $40,000.00, and because Lane and Aluli were to be his counsel and representative to recover the land herein in all the courts of the Territory and in this Honorable Court, to convey a two-ninths interest in said land to them. On November 22, 1916, petitioner executed the deed in conformity with the agreement. (Tr. pp. 29, 30, 31, 32, 33, 41.)

e. Petitioner alleges "in compliance with the conditions of the will" the tendering of the said $40,000.00 must be done on October 31, 1916, or lose his right to own property worth $1,250,000.00. (Tr. pp. 11, 12.)

f. Petitioner alleges that a valid tender was made on his behalf by Respondent Aluli. (Tr. p. 38.)

g. Petitioner admits and alleges "he has been without money and has had to borrow from said McCandless to live on." (Tr. p. 43.)

h. On September 17, 1917, nearly one year after the tendering had been made, and after the said agreement and said deed were executed, petitioner alleges he wrote through his attorney, W. J. Robinson, demanding these respondents to re-convey the said two-ninths interest which he had on November 22, 1916, conveyed them, charging "connivance, misrepresentation, fraud and deceit." (Tr. pp. 42, 43.)

i. About three months after the said letter of petitioner by W. J. Robinson was written, on January 10, 1918, petitioner concluded that Respondents Aluli and Lane were not bad men, did not do harm, but rendered him good and valuable services, and were his friends, for these respondents, with him, joined as co-plaintiffs in the ejectment suit for said land against Respondent Mary N. Lucas, et al. (Tr. p. 44.)

j. Petitioner alleges that in said ejectment suit E. C. Peters (now Chief Justice of the Supreme Court of Hawaii) was the attorney for Respondent McCandless and himself; that Respondent Aluli broke the said agreement in not appearing as his lawyer.

In re his disqualification in this case Peters said, as follows:

"In or about the month of January, 1917, L. L. McCandless, one of the respondents in the above entitled matter, retained declarent generally to estab-

lish, settle and protect all the right, title, interest and estate acquired by the complainant Frank C. Bertelmann." "That pursuant to and in compliance with said retainer, declarent as the attorney for the said Frank C. Bertelmann and the said L. L. McCandless instituted in the Circuit Court of the Fifth Judicial Circuit an action at law in ejectment for the restitution of the lands referred to in Paragraph 21 of complainant's amended bill." (Tr. pp. 44-45, 123, 124, 125.)

k. Petitioner alleges that Lane and Aluli rendered services and that he will pay for their services in the following language: "Petitioner offers to do equity, to pay said Noa W. Aluli the reasonable value of his services rendered, which he prays the Court to ascertain after hearing. And if this is not sufficient offer to do equity, petitioner here now offers to do whatever the Court may, upon hearing, find to be equitable and right in the premises to said Aluli and said Lane and each of them." (Tr. p. 38.)

l. Petitioner says that through fraud he conveyed to Aluli a one-ninth interest in the said land. (Petitioner's ~~typewritten~~ brief, page ~~6.~~ 8.)

m. On October 24, 1922, petitioner filed this bill and amended bill charging fraud and breach of contract against these respondents. The "summarized" of the typewritten brief of petitioner on page 88 charges want of consideration also. (Tr. pp. 2-88.)

n. These respondents and all the other respondents demurred upon several grounds. (Tr. pp. 113-115.)

o. The Supreme Court sustained the demurrers because of multifariousness and petitioner has full and adequate relief at law. (Tr. p 132; Tr. pp. 132-172.)

p. Petitioner appeals from this decision of the Supreme Court. (Tr. p. 180.)

q. TO AVOID REPETITIONS THESE RESPONDENTS WILL PRESENT AND DISCUSS BUT THREE OF THEIR SEVEN GROUNDS OF DEMURRER, AS HEREUNDER SET OUT.

II.

BRIEF OF THE ARGUMENT.

a. Demurrer will be sustained where the allegations of the bill are inconsistent.

b. Where no fraud was practiced by the attorney on the client in obtaining a deed to a two-ninths interest in the land to be recovered for his services—the attorney rendering services by securing $40,000.00 with which to make the tender to begin litigation for the recovery of said land—spent two days in making and did make a good and valid tender—joined with the client who was at that time represented by another attorney in the ejectment suit for said land, equity will not set aside said deed nor declare it a mortgage.

c. Where the attorney is prepared, ready, willing and anxious to represent the client in all courts according to the contract so to do—the client displaces

him through no fault of his, and is represented by another, equity will not disturb the deed conveying an interest in the land for his services in all courts.

III.

ARGUMENT.

(A)

A BILL ALLEGING INCONSISTENT FACTS IS DEMURRABLE.

The letter by W. J. Robinson, attorney for Petitioner, to these Respondents demanded a re-conveyance and charged connivance, deceit, misrepresentation and fraud. Very soon thereafter the Petitioner "took back" all the bad things he had said about these Respondents and did not want a re-conveyance when he joined with these Respondents as co-plaintiff in the ejectment suit against Mary N. Lucas et al. Inconsistency—is plain.

We respectfully submit, the Bill of Petitioner is inconsistent and therefore demurrable.

(B)

NO FRAUD—NO RELIEF.

To secure $40,000.00 under the circumstances of this matter, is not an every day occurrence.

Respondent Lane performed services for Petitioner. Respondent Aluli got the $40,000.00 and as admitted by Petitioner, he made a good and valid tender. Aluli made it possible for the Petitioner to

have his day in court. Without the services of Aluli, Petitioner, as admitted by him, would have lost an estate worth $1,250,000.00.

The deed sought to be set aside or to be declared a mortgage refers to the agreement and is therefore based upon it. The same two-ninths interest in the agreement is the same two-ninths interest in the deed. The deed does not give a bigger interest to these Respondents for their services. The Petitioner has not alleged that these Respondents were paid for their services nor has he alleged that they were to receive less or any portion of the two-ninths interest. His silence in this regard proves that it was agreed, understandingly and knowingly, between Respondents and Petitioner, that they receive and have a two-ninths interest, and so agreeing, it was put in the agreement and later in the deed. Respondents, and more particularly Respondent Aluli, is not a fool to go into a protracted land litigation without having his fee decided upon.

There might be some room for argument against these Respondents if the Petitioner had not spent one year in pondering over this estate and in trying to raise the $40,000.00; but having spent all this time, thinking over it for one year, it is respectfully submitted, Petitioner had all his faculties, knew well what he was doing, and was a happy man when he signed the agreement and deed.

Having in mind the value of the land involved, the work and the nature of the work performed and to

be performed in all of the courts of the Territory and in this Honorable Court, to the end that Petitioner might recover this "million-and-a-quarter estate," we respectfully submit, the two-ninths interest to these Respondents or the one-ninth interest claimed by Petitioner's brief, as Aluli's share, was and is not a hard bargain, was and is not unconscionable.

It is respectfully submitted, there is no fraud. The alternative prayer of the Petitioner that the said deed be declared a mortgage in the event it is not set aside for fraud, negatives and refutes the charge of fraud. Petitioner, knowing there was no fraud and no undue advantage taken over him, is willing to have the deed declared a mortgage for what the courts may decide to be the reasonable amount for the services of Respondents up to the time of the filing of said ejectment suit, which, therefore, admits by inference that the contract entered into was above board and not tainted with fraud, which, therefore, admits by inference that he did agree to give the two-ninths interest to Respondents, but since Aluli did not appear as his attorney in the ejectment suit, they (Aluli and Lane) should receive less, and as security he offers a mortgage.

Again, where is the fraud when Petitioner admits that Respondents are entitled to some remuneration, for, then, it means that these Respondents and Petitioner had amicably agreed upon a definite figure for a certain amount of work, and when, as claimed by Petitioner, the alleged breach occurred, he

(Petitioner) now agrees to pay for the services up to the time of the alleged breach. If there was fraud, the Petitioner would never consent that these Respondents be paid.

(C)

NO BREACH—NO RELIEF.

Petitioner on page 37 of the transcript alleged "that the consideration of the conveyance of the interest to said Noa W. Aluli was the services he had *theretofore* performed and the services he agreed to perform *thereafter,* and in so far as the consideration for services *thereafter* to be rendered, he has wholly failed," meaning that the services *thertofore* or the services before the ejectment suit, were performed according to the said agreement, but that as to the services *thereafter* or after the ejectment suit was filed, Respondent Aluli, because he did not appear as counsel for Petitioner, thereby broke the said agreement. Where is the "want of consideration" when Petitioner admits Aluli did work *theretofore,* and as to the services *thereafter,* Aluli, although displaced by Petitioner, rendered this in an indirect way by representing himself and by acting as the attorney for Lane, since their interests (Petitioner's, Lane and Aluli) were and are the same.

We submit the breach was caused by Petitioner because together with McCandless he and they wanted to get another lawyer, which lawyer was E. C. Peters, now Chief Justice of Hawaii.

Petitioner did not allege that Aluli would not or had refused to act as his attorney. It is apparent that Petitioner went in with Respondent McCandless (who had produced the $40,000.00 and who had been lending him money, which is but the natural thing for him to do) and employed E. C. Peters. The case was taken out of the hands of Aluli by Petitioner, and the delay, if any, cannot be attributed to him.

Did E. C. Peters in January, 1917, enter the services of Petitioner without his consent and approval? No. Petitioner was happy when Peters was enrolled on his behalf. Petitioner has alleged that he was and is a poor man—that McCandless was and is rich, and he employed Peters for him (Petitioner); therefore, we contend, he was satisfied and contented when through McCandless (McCandless who produced the $40,000.00) he obtained the services of E. C. Peters, one of the leading attorneys of Hawaii. The appointment of Mr. Peters to be Chief Justice of Hawaii bars all thoughts that he was not acceptable to Petitioner and confirms our contention that Petitioner was a happy man when Mr. Peters was secured as his attorney. Chief Justice Peters has declared that he was the attorney for the Petitioner and we submit the Petitioner cannot deny it. We submit that E. C. Peters was the attorney for Petitioner in January of 1917—was his attorney from that time on up to the time of the filing of said ejectment case —was his attorney when the said case was filed and was his attorney during the years which followed the

filing of said suit up to the time of his appointment to the bench. Petitioner cannot now be heard to say that the breach was caused by Aluli after being silent for nearly six years from January, 1917, to October, 24, 1922. The silence of Petitioner for six years confirms our contention that he displaced the services of Aluli for Peters.

It is apparent Aluli was displaced by Petitioner; still, at the same time, Petitioner retained the services of Aluli in that, being co-plaintiff, to protect his (Aluli's) rights and interests, he (Aluli) had to get in and work also. Where is the loss to Petitioner when instead of having one lawyer, he, because of the appearance of Peters, had two.

It is also apparent that Aluli is not a fool to throw up the case and break the contract when more than half of the work was done and when the remaining work was simply a question of law, whether or not a proper tender had been made by him.

Petitioner charged Respondent Aluli (on pages 37 and 38 of the transcript) to be incompetent—he (Aluli) should have tendered the $40,000.00 to the ex-officio clerk of the court and should have asked equity to advise how and to whom the tender should be made—he (Aluli) "killed time hunting Mary N. Lucas, who was in hiding to avoid tender after having made a valid and legal tender to her agent." In reply Aluli submits his record in this Honorable Court in cases numbered 3099 and 3361, where, approving the arguments of Attorney Noa W. Aluli, this Honorable Court sustained the decision of the

Supreme Court of Hawaii and where, approving the arguments of Attorney Noa W. Aluli, this Honorable Court reversed a unanimous decision of the Supreme Court of Hawaii. And in further reply Aluli contends: there is no provision in the Statutes of Hawaii authorizing the placing of money such as this in the hands of the ex-officio clerk of court and there is no provision to exact a bond from the clerk whereby this large sum of $40,000.00 would be protected from burglars or thieves. Why go to equity to ask questions when it was impossible as there were only two days remaining to make the tender? Why ask equity when the direction of the will is specific?

We respectfully submit there was no breach on the part of these Respondents, that the breach was on the part of the Petitioner and for which Respondents should not suffer.

IV.

CONCLUSION.

It is respectfully submitted, the Petitioner should confine and limit his present activities towards these Respondents and Respondent McCandless by filing a non-demurrable bill (if he can) and should he prevail (we claim he cannot), then to proceed alone in the said ejectment suit against Mary N. Lucas et al; should he fail and should the courts find there was no fraud and no breach of contract, then Petitioner should again "make up" with these Respondents and all together proceed with the said ejectment case. The present attitude of Petitioner in joining Respon-

dents with Respondents Mary N. Lucas et al., is multifarious.

From all of the foregoing, also, we submit the decision of the lower court be sustained.

NOA W. ALULI, in propria persona,
and as Attorney for Respondent
JOHN C. LANE.

Dated, Honolulu, T. H., April 3, 1925.

No. 4481

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

FRANK C. BERTELMANN,
Appellant,

vs.

MARY N. LUCAS et al.,
Appellees.

BRIEF FOR KILAUEA SUGAR PLANTATION COMPANY

Upon Appeal from the Supreme Court of the Territory of Hawaii.

FREAR, PROSSER, ANDERSON & MARX,
W. F. FREAR,
Attorneys for Appellee Kilauea Sugar Plantation Company,
Honolulu, T. H.

Filed this ..... day of April, 1925.

F. D. MONCKTON, Clerk.

By.....Deputy Clerk.

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In Equity.
On Appeal from the Supreme Court of Hawaii.

BRIEF FOR APPELLEE KILAUEA SUGAR PLANTATION COMPANY

I. QUESTIONS INVOLVED; SCOPE OF THIS BRIEF.

The grounds of the seven demurrers include not only the fundamental questions (involving the construction of the will) of whether the appellant, if he ever had the right to perform, had not lost it by reason of having parted with his interest in the land and whether, if he had the right to perform and had not lost it, he did not fail in his attempt to perform by reason of having made

the tenders to the wrong persons, that is, to the grantees and heirs of the daughters and shortcoming sons instead of to the daughters and shortcoming sons themselves, but also such grounds as multifariousness, misjoinder, adequacy of remedy at law, lack of prior determination of questions at law, pendency of another action, laches, etc., etc. The Circuit Judge sustained all the demurrers upon all grounds. The Supreme Court sustained the demurrers upon two of these grounds, namely multifariousness and adequacy of remedy at law, and expressed no opinion upon the others. We commend to the attention of this Court the opinion of the Supreme Court for an excellent summary (Tr., pp. 134-144) of the lengthy amended bill and for a review (pp. 144-171) of the law as applicable to this case upon the two questions covered by the opinion. This respondent's demurrer (Tr., p. 101) sets forth twelve grounds, but this brief will be devoted mainly to the two fundamental grounds just referred to, inasmuch as two of the other grounds are covered so fully and effectually in the opinion of the Supreme Court and all of the other grounds will probably be fully covered by the briefs of other appellees, particularly Mrs. Lucas and the Scott children, whose lessee this respondent is as to 8/9 of the land under Mrs. Lucas and as to 1/9 under the Scott children, at a total rental of $8000 a year (Tr., pp. 27, 85). These three (this appellee, Mrs. Lucas and the Scott children) form a group with similar interests as the parties in possession claiming legal title.

The petitioner has devoted much of his brief to these two fundamental grounds and expressed the wish that the court might decide them in order that he might know once

for all if he has no right to the property rather than that the case should be decided on other points which might necessitate further litigation,—perhaps only to find out at last that he is not entitled to the property. We join in the desire for a decision on one or both of these grounds if such decision is against the appellant; for a decision on either, if adverse to the appellant, would settle the entire case and not only render it unnecessary to decide any of the numerous other questions raised by the demurrers but avoid further litigation, while a decision on both as well as on the numerous other questions and much further litigation would be necessary in order to decide the case finally for the appellant. See appellant's brief, pp. 19, 131.

These two questions are whether under the provisions of the will the appellant could and, if he could, whether he did perform the prescribed condition so as to entitle him to relief under any circumstances against any of the parties, or at least against the group to which this appellee belongs, in any form of action or suit, whether at law or in equity.

So far as necessary for the purposes of these grounds a brief statement of the existing status as to the facts involved in the construction of the will and the construction thus far made of the will in former decisions follows:

II. PRESENT STATUS AS TO FACTS AND FORMER DECISIONS.

The testator, Christian Bertelmann, died in 1895 (Tr. p. 4) leaving a widow, three sons and six daughters, for whom he made provision by the will (Tr. p. 70) in question. By item First he disposed of the rental, $6000.00 a

year, of the land in question under a lease to expire November 1, 1915, one-third to the widow and two-thirds equally among the children. By item Second he divided a small tract of land into ten lots and gave one to the widow on condition that she should not dispose of it outside of the family and expressed a wish, not mandatory, that if she should dispose of it (that is, within the family) she should give a preference to the eldest son, provided she had no special reason for preferring any of the other children, and gave the remaining nine lots to the several children with a direction that they should not be disposed of outside of the family as long as there should be offspring of the family. By items Third and Fourth, besides making provision for the wife for life, he gave the land in question equally to all of the children with a provision that a performing son or sons might by payment, in the year following the lease, of $5000.00 to each of the daughters and non-performing sons, if any, have the whole land, but that, if they should not perform, the land should be sold and the proceeds divided equally among all the children or their lawful heirs and assigns.

The widow died in 1915 (Tr. p. 24). One daughter, Catherine, who became Mrs. Scott, died before the expiration of the lease (Tr. p. 13) leaving three children as her heirs, one of whom has died since. The other five daughters and two of the sons sold their interests to Mrs. Lucas (Tr. p. 11) and the interest of the remaining son, the appellant, was sold to her on execution (Tr. p. 16)—all before the expiration of the lease. The appellant claims that the execution sale was void (Tr. p. 17) and that he is a performing son by reason, as he says, of having tendered

$35,000 to Mrs. Lucas (Tr. p. 11) and $5000 to the guardian of the Scott children (Tr. p. 13) on the last two days of the year after the lease. In order to get the money he agreed to convey and shortly afterwards purported to convey 6/9 of the land to Aluli, Lane and McCandless.

The construction of the will has been the subject of three decisions.

The first of these, Bertelmann v. Kahilina, 14 Haw. 378, was a submission to the Supreme Court of Hawaii upon agreed facts in 1902 and was between the appellant and one other son as plaintiffs, and the widow and four of the daughters with their husbands as defendants. The question was, what interests did the widow, the sons and the daughters take under the will. A summary of the conclusions of the Court is set forth on page 384. In brief, subject to the widow's interest, now terminated, the Court, one member dissenting, held that all the children took present vested estates in fee simple, that is, one-ninth each,—the interests of the daughters and also of the shortcoming sons, if any, being defeasible in favor of the performing son or sons, if any, upon the performance of a condition, that is, the payment of $5000 to each of the others by the performing son or sons. All took defeasible vested estates in fee simple, and the performing son or sons, if any, would take by way of contingent executory devise such estates as might be defeated by performance of the condition. The condition would be a condition subsequent for the purpose of defeating the interests of the daughters and shortcoming sons, and a condition precedent for the purpose of vesting those interests in the per-

forming sons. This construction of the will was followed by the same Court of different personnel in the later case of Scott v. Lucas, 23 Haw. 338, and on appeal in the latter case by this Court in 239 Fed. 450. These three decisions must be regarded as settling beyond controversy the construction of the will as to what estates were taken by the sons and daughters under the will and the shiftability of the interests of some of the children to the others upon the performance of the condition—and such is the appellant's concession and contention (Tr. p. 8; Brief, p. 67).

The second case, Scott v. Lucas, 23 Haw. 338, was also a submission to the Supreme Court of Hawaii upon agreed facts, in 1916, the year following the expiration of the lease. Meanwhile Mrs. Mary N. Lucas had acquired the interests of the two sons other than the appellant and of the five daughters other than Catherine, by voluntary conveyances and, besides holding a mortgage of appellant's interest, claimed to have acquired his equity of redemption, that is, all his interest by purchase upon the execution sale above mentioned. She claimed the right, as owner of eight-ninths, to acquire the remaining one-ninth by paying $5,000 to Catherine's heirs, her three minor children, whose guardian was the Bishop Trust Co., Ltd. The case was between these minors and their guardian as plaintiffs and Mrs. Lucas as defendant and was brought for the purpose of determining whether Mrs. Lucas could thus acquire the interest of the minors. Two questions were involved and considered by the court. One was whether the right or privilege of performing the condition and thus acquiring the other interests was personal to the sons or could be transferred by them to another person,

namely, Mrs. Lucas; the other was whether the liability of any daughter or shortcoming son to have his or her interest defeated or divested by performance of the condition was personal to such daughter or son or could pass from him or her to his or her successor in interest. In other words, on the one hand, could the right or privilege of performing the condition and thus acquiring the other interests be exercised by Mrs. Lucas as assignee of the sons; and, on the other hand, even if she could exercise such right or privilege as against Catherine, in case Catherine were still living, could she exercise such right or privilege as against Catherine's heirs after her death. The court based its decision on the second of these questions and held that, inasmuch as an estate could not be defeated by the performance of a condition subsequent unless the condition were performed strictly and fully and inasmuch as the condition in question could be performed strictly and fully only by paying the $5000 to Catherine herself, it could not be performed strictly and fully at all by reason of her death; in other words, that payment of the $5000 to others, namely her children, even though they were her heirs and successors in interest, would not be strict and full performance. The court intimated strongly also—on the first of these questions—that the right or privilege of performing was likewise personal and that Mrs. Lucas could not as the assignee of the sons perform the condition precedent to acquiring the interest of Catherine or her minor children but stated that it was unnecessary to decide this point definitely. One member of the Court, the Chief Justice, now attorney for Mrs. Lucas, dissented on both of these points, but not only must the

majority view be considered as determining the law to the same extent as if the decision had been unanimous, but this Court sustained the majority, basing its decision however on the first of these questions and saying that it was unnecessary to decide the second.

In that case on appeal in 239 Fed. 450, this Court, besides holding that payment of the $5,000 was a condition, held that the right or privilege of performing the condition was personal to the sons and could not be transferred to Mrs. Lucas, their successor in interest. The Court took the view that for the purpose of acquiring the other interests the condition was a condition precedent and that the condition precedent in order to operate would have to be fully and literally performed—just as the same condition as a condition subsequent for the purpose of defeating the other interests would have to be fully and literally performed, as held by this Court and by the Hawaiian Supreme Court. See pages 456-457.

III. APPELLANT DID NOT PERFORM THE CONDITION BECAUSE HE MADE THE TENDERS, IF AT ALL, TO THE WRONG PERSONS.

The first to be considered of the two fundamental questions stressed in this brief is whether the allegations of the bill show that the appellant performed the condition, assuming that he had the right to do so. If, as we contend, he did not perform, he is out of court at the start. This question is raised in general by Par. I and in particular by Par. IV of this appellee's demurrer (Tr. p. 102).

Under this question we do not propose to discuss secondary matters or matters of detail, as, for instance, whether the bill shows that the tender of $35,000, if made, was made at the right time or whether it could be made to Mr. Lucas instead of to Mrs. Lucas or at her premises in her absence, etc., or as to whether the tender of $5,000 could be made to the guardian instead of to the Scott children themselves.

Whatever the details may be as to when or how he attempted to make the tenders to certain persons directly or indirectly through their alleged representatives, the bill shows that the appellant did not make or attempt to make any tenders to the other sons or to the daughters themselves but intended to make tenders, if at all, only to Mrs. Lucas and the Scott children, directly or indirectly, that is, to the successors in interest of the other sons and the daughters in the land.

Our contention is that the condition could be performed strictly and literally, as required, only by making the tenders to the other sons and the daughters, at least to those who were living, and that tenders to other persons, particularly to Mrs. Lucas, cannot be held to be performance of the condition.

Appellant himself seemed to realize the embarrassment of his position in this respect, for (Tr. p. 37) he charged Aluli, through whom he claims to have made the tender, with having neglected to make it in such manner as he should have known how to make it and in such manner as it could have been made by a lawyer competent to handle such a matter and particularly by reason of not having deposited the money in court with a petition asking the

court to decide to whom it should be paid, and (Tr. p. 43) he charged Aluli, Lane and McCandless with endeavoring to make him believe that a mistake had been made in tendering the money to Mrs. Lucas instead of to the other sons and the daughters.

The basis advanced by him for his contention that the tender was properly made to the successors in interest of the daughters and other sons is that performance was a purchase of the other interests in the land and hence that the tenders had to be made to those who then had the other interests, namely, Mrs. Lucas and the Scott children. (See, e. g., his brief, pp. 80, 85, 92, 101.) There is, however, we submit, no such basis. The transaction was not one of purchase and sale but was one of performance of a condition—although such expressions as "buy out" "bought out," etc., have been used more or less by attorneys and courts as a matter of convenience. This court even went so far in one place (239 Fed. at 457) as to refer to a conveyance—of course not meaning to decide that a conveyance would be necessary. The Supreme Court of Hawaii, in 14 Haw. 378 at 383, referred to the use of the word "buy" in one place in the will as bearing on the question of what estates were given, not as showing that a purchase and sale was intended; that word was used as meaning "buy" only "in a certain sense." The decisions as to defeasible vested fees, executory devises, conditions precedent and subsequent, strict and literal performance, etc., show that none of the courts considered it a case of purchase and sale.

There was no agreement or contract of purchase and sale between a would-be performing son and the short-

coming sons or the daughters or the latter's heirs or assigns. There was no privity between them, much less between a would-be performing son and Mrs. Lucas. There were no negotiations for a purchase and sale. The short-coming sons and the daughters and Mrs. Lucas had and could have nothing to say or do about the amount to be paid or whether it should be paid at all or when or what the effect of payment would be. The performance of the condition by payment of the $5,000 to each of the right persons would effect a defeasance of the other interests and vest them in the performing son or sons, whether the others so desired or not. This would be by force of the will as made by the testator, who, of course, could not make contracts for others. As held by the Supreme Court in the first case (14 Haw. 378), followed in the later cases, and asserted by the appellant in his bill (Tr. pp. 8, 9, 10, 15-16) the sons by performing the condition would take the interests of the others by way of executory devise, that is, under the will and not under any arrangement between the children. Indeed the appellant claims that by reason of the alleged tenders he became vested with the "whole estate" in the land. No conveyance was required. No suit for specific performance of a contract or agreement to make a sale or conveyance could be maintained, for there was no such contract or agreement. Moreover, the performance of the condition by the payment of the $5,000 to each of the others was to effect the transfer irrespective of how valuable the several interests might be. No doubt the testator desired to be fair as between his children and when he made his will in 1891 $5,000 may have been a fair valuation of each ninth interest, but if the appellant's

allegations (Tr. p. 34) as to the value of the land are true or even 20% true the value of each interest at the time of the tenders was far more than $5,000. It was the performance of the condition that was to effect a transfer, that is, a divesting from some and a vesting in others. It would be precisely the same if the condition were of any other kind. Instead of a payment to each of the others, it might have been a payment of the testator's debts to his creditors, or it might have been a payment to certain charitable institutions, or it might have been the performance of some other act than the payment of money, as, for instance, going through college, or getting married, &c.

Suppose the other sons or the daughters or Mrs. Lucas had made a conveyance to someone else who had not yet put the conveyance on record and suppose appellant knew nothing about it, whether it was on record or not, it would be impossible for him to perform the condition if he had to perform it by making the tenders to those who held the interests at the time. Or suppose the other sons or the daughters or Mrs. Lucas had conveyed part of their interests to one person and part to another or parts to many different persons, then if the tenders had to be made to those who at the time held the interests, how would appellant be able to make them? Or suppose there was a question as to who the heirs of a deceased son or daughter were? How could he know how much to tender to one and how much to another? Suppose the Scott children were of age, should he have tendered 1/3 of $5,000 to each of them? Suppose they were under age and had no guardian? Again, if the tenders had to be made to those who held the interests at the time and not to the

shortcoming sons and daughters, then since this appellee, the Kilauea Sugar Plantation Company, had an interest in the property, namely, a lease from Mrs. Lucas for a considerable time yet to come, a proper proportion of the money should have been tendered to it but no such tender was made to it. Or suppose one of the sons or daughters had conveyed a life interest to A with remainder in fee to B?

This is the view (namely, that the tender if properly made would effect a transfer as a performance of a condition and not as a purchase and sale) taken by the petitioner and his then co-plaintiffs, Aluli, Lane and McCandless, when they brought the action of ejectment on the theory that the legal title had passed to them by performance of the condition and this is the claim of the petitioner in the present suit. If he should wish something of record to show his alleged title he could not compel a conveyance from Mrs. Lucas, nor could he compel one from the shortcoming sons and the daughters if the tenders had been made to them, but he would have to look to a judgment of court, as, for instance, in an action of ejectment or in a statutory action to quiet title, or a decree of the Land Court. Perhaps he could obtain a decree in equity if he were in possession. He claims now also that, though out of possession, he could obtain a decree in equity settling the title but we need not stop to consider that at this point. If he could obtain such a decree, it would be a decree settling the title by its findings—not a decree for specific performance, &c.

Since the interests of the shortcoming sons and the daughters were defeasible (though vested) fee simple in-

terests, any purchaser, as, for instance, Mrs. Lucas, would take them as defeasible estates, that is, would take the interests subject to their being defeated by performance of the condition. Mrs. Lucas took the risk, just as anyone who might purchase a defeasible estate would take subject to the conditions imposed upon it. This is the view taken by the appellant. (Tr. pp. 8, 9; Brief, p. 40.)

Being a condition, the payment of the $5,000 to each of the shortcoming sons and daughters would have to be strictly, literally and fully performed, as held by the Supreme Court of Hawaii and this Court. It was because of this that the Supreme Court held that the tenders could not be made to the Scott children but as to them would have to be made, if at all, to their mother, Catherine, and that since it could not be made to her on account of her death it could not be made at all as to that ninth. This also is why this Court held that Mrs. Lucas could not make the tender even to Catherine if she had been alive. In other words, the tender had to be made by one or more of the sons and by no one else, and it had to be made to the other sons and the daughters and to one one else.

The appellant alleged (Tr. p. 11) that the other sons and the surviving daughters had sold to Mrs. Lucas their several rights to be paid the amounts which would soon have been due to be paid to them,—but this is obviously a mere conclusion—the appellant's inference that a conveyance by a shortcoming son or daughter of his or her ninth interest to Mrs. Lucas would carry with it the right to be paid the $5000, and this is the view taken by the appellant in his brief at p. 89. As to Catherine there had not even been a conveyance to her children. Moreover, it is not

true that these amounts were soon to become due. There was no obligation on the part of any son to make the payments. It was purely optional and there was no right on the part of any shortcoming son or any daughter to enforce any payment. No such payment could be enforced by any of them by a suit or action at law or in equity. In the case of Scott v. Lucas in the Supreme Court and in this Court it appears that the other sons and the surviving daughters had sold their interests to Mrs. Lucas and further (239 Fed. 456) that the other sons (not the daughters) had purported to convey to Mrs. Lucas not only their interests in the lands but also the rights, powers and privileges granted under paragraph THIRD of the will, that is, to perform the condition and so acquire the title, and yet, notwithstanding this sweeping attempt to transfer to Mrs. Lucas the right to make the tender and thus to acquire any outstanding interests, the court held that the right did not pass because it could not pass, whatever agreement might be made between the sons and Mrs. Lucas. If the right to make the tenders which actually existed in the sons could not be transferred, certainly the alleged right to be paid $5,000 each which did not exist in the sons could not be transferred. Moreover, their deeds did not even purport to transfer any moneys or the right to any moneys that might be paid to them by a performing son.

Each shortcoming son and each daughter might have entered into a valid agreement with Mrs. Lucas to the effect that if the $5,000 should be paid to him or her he or she would pay it over to Mrs. Lucas. That would be a contract to do something in the future upon a contingency,

but not only does it not appear that any such contract was made but no such contract could be binding on or taken advantage of by a performing son. There was no novation of parties, even if there could have been a novation, for a novation would require the assent of all three parties, namely, the performing son, the shortcoming sons and Mrs. Lucas. Of course there could be no novation of contract because there was no contract between a performing son and a shortcoming son or any contract of the kind in question between the shortcoming sons and Mrs. Lucas, and besides no agreement whatever between a shortcoming son and Mrs. Lucas could change the will of the testator or the nature or terms of the condition imposed by the testator, which was that the payment should be made by a son or sons, as held by the Supreme Court and this Court, to a son or sons and daughters, as held by the Supreme Court, and no shortcoming son and third party could change the terms of that condition, and much less could a would-be performing son change the condition without the concurrence of the shortcoming sons and Mrs. Lucas. If the would-be performing son did not care to take the risk of making the tenders to the shortcoming sons and the daughters for fear that they would take the money, or if for any other reason he failed to perform the condition by making the tenders to them he has only himself to blame, and Mrs. Lucas is entitled to keep the interests for which she paid good money and as to which she took her risk and fortunately for her came out successfully.

Appellant cites four state cases on pages 95-7 of his brief, all of which, we submit, fortify our contentions.

They are Johnson v. Johnson, 81 Pa. 257 (wrong citation for 32 P. F. Smith 257); Bayer v. Walsh, 30 Atl. 1039 (166 Pa. St. 38); Schrader v. Schrader, 139 N. W. 160 (158 Ia. 85); Jacobs v. Ditz, 102 N. E. 1077 (260 Ill. 98). These support our contention that tender or payment is a condition, performance of which would divest the estate in some and vest it in others, and that the theory of a purchase and sale or the necessity of a conveyance is not sustainable, although the wording in some of these cases was more favorable to that theory than is the wording now under consideration. In the Iowa case, it is true, the court, by a 3 to 2 decision, held that tender or payment was a charge and condition subsequent, not precedent, but under language quite different from that now in question. To avail himself of that case, appellant would have to maintain that he obtained directly by the will at the outset a vested estate in the interests of the shortcoming sons and daughters subject only to a charge to pay $5000 to each of them, nonpayment to operate as non-performance of a condition subsequent to defeat his estate—contrary to the decisions already made construing this will.

The shortcoming sons conveyed to Mrs. Lucas merely their defeasible original ninth interests in the land, which she took subject to the chance that they might be defeated. They did not transfer or relinquish their right to the $5000 in case it should be paid. If they had they naturally would have asked a higher price of her.

On this question as to whether the tenders should have been made to the brothers and sisters or to Mrs. Lucas, the appellant, besides advancing the theory of "purchase

and sale," discussed above, advances also the theory of "option." See his brief, pp. 84, 103-4. He says, "A gave B an option on his land, and then sold it to C, who had knowledge of B's option; B tendered payment to A in performance of the conditions of his option and his tender was held good, because C had knowledge of B's rights when he acquired title," and in support of this he cites Frank v. Stratford-Handcock, 77 Pac. 134 (13 Wyo. 37). This is sound law but has no application to the present case. In that case the tender was made to the vendor while in the present case it was made to the vendee,—the vendor in that case corresponding, so far as he corresponded at all, with the shortcoming sons and the daughters in this case, and the vendee corresponding with Mrs. Lucas. In other words, the tender was made in that case just as we contend it should have been made but was not made in the present case. In that case also there was a contract between the vendor and the person who made the tender for the purchase of the land, that is, there was a contract between the parties corresponding in the present case to the shortcoming sons and the daughters on the one hand and the appellant on the other hand—which is not the case here. In that case also the covenant to convey was a covenant in a lease and ran with the land. In such cases of course the vendee is bound if he is not an innocent purchaser for value. The theory upon which he can be held is that after the vendor has given a binding option he in law holds the title as trustee for the person to whom the option was given, and if he sells to another who has notice of the option, such other likewise holds as trustee for the person to whom the option was given,

who is regarded as holding the equitable title or right. Hence if the person having the option performs he may hold both the vendor and the vendee although in different ways. Ordinarily the question would arise in a suit for specific performance, and since the vendee has and the vendor has not the legal title the vendee is the one who is ordered to make the conveyance, but even then it does not follow either that the tender should be made to him or if made to him alone that it would be sufficient, or in any event that he is entitled to any or all of the purchase price payable by the one who holds the option. How much of the purchase price he would be entitled to would depend upon the circumstances and particularly upon whether that amount was greater or less than the amount which he paid to the vendor—as held in the Frank case above cited.

Appellant further says on the same page (84) of his brief that, "It is well settled that one who sells land on which another holds an option, sells to his vendee the right to collect from the holder of the option, and payment to the owner's vendee is payment to the owner," and cites a number of cases in support of that statement, but an examination of the cases will show that he cited the wrong list of cases, if he had a list in support of that statement, for the cases cited relate to other subjects. We need not reiterate what we have already said to show that there is no analogy between this case and the ordinary case of an option created by contract.

There is nothing magic in the word "option." Indeed, that word is not even used in the will. Appellant seems to think that, if the law is as he states it with reference to an

option created by contract between the parties, it must be so in the present case because a son has an option to perform or not as he pleases. An option is merely a power or a right to make a choice to do or not do something, but it makes a great difference, so far as legal rights are concerned, how the option arises or what its nature is. If a piece of land is offered at auction I have the option of bidding and, by bidding high enough, of buying, but no legal rights arise from the fact that I have such an option. That kind of option is not what is meant when we speak of option with reference to legal rights. Similarly the option in the present case is not in the same category with options created by contract, although it is not an option that exists per se like the option just referred to. It is, however, an option or power conferred, not by the other party but by a third party, not by contract but by will, and, if exercised, the shifting of the title is not by conveyance or any act on the part of the previous holder but by force of the will. The performance is simply the performance of a condition named in the will.

If appellant's analogy is good so that tender could be made to Mrs. Lucas instead of to the other sons and the daughters, as in cases of options created by contract between the parties in which, at least under some circumstances, the right to receive the money and the duty to convey passes from the vendor to his assigns, then equally the analogy should hold in the reverse case, that is, the right to pay and to obtain title should pass from the other party to his assigns, and yet this Court has held with reference to this very will that the right to perform and obtain title did not pass from the shortcoming sons and

the daughters to Mrs. Lucas. Indeed, even on appellant's own suggested analogy (on the question of the right to the money and duty to convey passing from one who gave an option to one succeeding to his interest) the Supreme Court of Hawaii has likewise held that the right to the money and liability to lose the property did not pass from Catherine to her children. Appellant's counsel ignores the latter decision altogether.

We submit further that, aside from the conclusiveness of the foregoing reasoning, some deference should be given to the decision of the Supreme Court of Hawaii in Scott v. Lucas, 23 Haw. 338, as stare decisis, (not res judicata) in holding that the appellant, even if he had a right to perform the condition at all, could not perform it by making payment or tender to Mrs. Lucas. The court held that even if Mrs. Lucas had the right to perform the condition she could not do so by making payment or tender to the Scott children or their guardian, because the liability to lose an interest by divesting could not pass from a shortcoming son or a daughter to another. It held that, even if Mrs. Lucas could properly make payment or tender to Catherine in case Catherine were alive, she could not make it to Catherine's children after her death—although they were her successors in interest and inherited all rights of hers that could possibly pass from her to her children. How much more then, if possible, would it follow that payment or tender could not be made to Mrs. Lucas as the assignee or grantee of the shortcoming sons and the other daughters, and that, too, when she was an assignee of merely their interests in the land! In her

case she was a successor in interest by mere voluntary conveyance and her grantors were still in existence to whom payment or tender could be made, while in Catherine's case her rights went by law to her children and she was no longer in existence, so that payment and tender could not be made to her. The Circuit Judge was of course bound by that decision of the Supreme Court until the Supreme Court itself or a higher court should change the decision. But even the Supreme Court itself is bound by that decision as stare decisis to the same extent that it would be bound by any other decision as stare decisis, that is, to say, it could not take the position that the question had not been decided. The most that it could do would be to hold that the question had been decided but that like any other decision on any other point the Court might reverse its own former decision, which, of course, it does not do except in rare instances. This Court, of course, would not be absolutely bound by that decision because this is a higher court but until the Supreme Court or this Court reverses that decision it is stare decisis as to the Supreme Court, subject only to be reversed by the Supreme Court and not treated by it as an open question, and was absolutely binding upon the Circuit Judge. Mayor, &c. v. East Jersey Water Co., 70 Atl. (N. J.) 472, 488. The only way in which the appellant could try to get by the doctrine of stare decisis would be to contend that, because this Court decided the case on a different point, the point on which the Supreme Court decided it did not become stare decisis, but that argument would not hold. In the New Jersey case just cited

the State court decided on one point and the Federal Supreme Court on a different point and it was then contended that the point on which the State court decided was left open and was not stare decisis but the court held otherwise.

We contend further that since the condition could not be performed as to Catherine's ninth (because it could not be performed by payment or tender to her children) it could not be performed strictly, literally and fully at all. In other words, even if it could be performed as to the interests of the other two sons and the five surviving daughters by making tender or payment to Mrs. Lucas it still could not be performed as to Catherine's interest by making tender or payment to her children or their guardian and hence could not be performed at all because it had to be performed as to all or none.

IV. APPELLANT COULD NOT PERFORM THE CONDITION—BECAUSE, BY THE CONVEYANCE OF HIS INTEREST, HE HAD LOST THE RIGHT TO PERFORM.

The other of the two fundamental questions referred to above is whether the appellant at the time he claims to have made the tenders had the right to perform the condition or had then lost the right. Our contention is that he had lost the right. This question is raised in general by Par. I and in particular by Par. III of this appellee's demurrer (Tr. p. 102).

Appellant had lost his interest in the property and

hence was in no position to perform the condition and acquire the other interests because the will contemplated that the performing son or sons should have all interests or none and especially that they should keep their own original interests.

That this was the intention is shown by the reasoning of this Court in 239 Fed. at page 456. As the Court said, it was strictly a family scheme and the testator's idea was not that the sons should be favored as against the daughters in the distribution of the property but that the title of the land, subject to performance of the condition, should be kept in the male members of the family. Incidentally the testator probably had, as said by the Court, for one of his purposes the encouragement of his sons to practice habits of industry and thrift and to accumulate the moneys required for performing the condition when the appointed time should come. The idea was that the male members should get and keep all the property. This also, as the Court said, was in harmony with the previous provision of the will in which after having devised to each child a small piece of land the testator directed that no one of the pieces so devised should ever be conveyed or sold or in any other way disposed of outside of his family so long as there should be one or more legal offsprings of his family. But not only the appellant but the other two sons, so far from economizing and saving and practicing thrift so as to be in a position to perform the condition, squandered what they had and at the outset sold out the interests that were given to them.

Suppose all three of the sons had combined to make the payments or tenders, there would then be this absurd situation (if the sons could perform notwithstanding that they had parted with their original interests) that the three sons had conveyed away or lost their original three-ninths and had by making tenders to the daughters or their respective heirs or assigns acquired the other six-ninths and so would have the six-ninths originally given to the daughters but not the three-ninths originally given to themselves and so would have failed to carry out the intention of the testator as expressed in the will wherein he expressed his sincere wish and will that his land should befall in equal shares and interests upon his three sons and wherein he provided, in case of one or two shortcoming sons, that the other one or two sons should have a right to acquire the whole of his land and wherein he provided that upon performance his performing son or sons would enter in full possession of all his land and that his or their right and title would be undisputable. Or, would appellant contend that the three sons should make tenders or payment also to their own assignees, and so recover from them at $5000 each however much they may have sold to them for! It would seem to be clear that the appellant could not perform the condition and acquire the other interests unless he still had his own interest. The only question is whether he still had that.

In the first place, his original ninth was conveyed to Mrs. Lucas as the purchaser upon an execution in February, 1903, as set forth in Par. XIII of the bill

(Tr. p. 81; see also Brief p. 6). The appellant had already mortgaged his interest to Mrs. Lucas for $9,845, as set forth in Par. XIV, and what was sold upon execution was his equity of redemption, that is, his interest subject to the mortgage. He claims in the bill that that sale was void on several grounds.

For instance, he claims (Tr. p. 81; Brief, pp. 6, 110) that his right or interest in the nature of a contingent executory devise was not subject to sale because it was personal and non-assignable. He, however, gives no reason why his original ninth interest was not saleable and assignable. That was given to him outright as a present vested estate in fee simple and, although it was subject to be divested by his becoming shortcoming and by performance by one or both of the other sons, not only did the other sons fail to perform but, even if they had performed, his original ninth interest could have been previously sold or assigned subject to be divested. That was a present vested interest and not even an executory devise. Apparently the appellant had in mind the contingent executory devise which he might acquire by performance of the condition, in the other interests, that is, those of the shortcoming sons and the daughters, but those are not the interests in question. He had parted with his own ninth interest which undoubtedly was assignable. He contends that the original ninth interests of the other sons were assignable and it is upon that contention that he claims to have made the tender to Mrs. Lucas—because she had acquired those interests. If their interests were assignable, his was.

Again, he claims that the price paid on the execution sale was so grossly inadequate as to render the execution sale void on account of fraud, alleging that the value of the rights sold was more than $50,000 and the price only $50.00. If the price were so inadequate and if there were fraud, the sale at most would be voidable and not void, but obviously it is not voidable; for, aside from the fact that mere inadequacy alone apart from other things is not sufficient to make out a case of fraud, the doctrine of inadequacy of consideration has no application to an execution sale. That was not the case of a sale by agreement between the parties, in the negotiation of which one party might have committed fraud on the other. At such a sale the purchaser was merely one who was present at the auction and bid on the property. Mrs. Lucas was not even the plaintiff in the case in which the execution issued. It does not appear in the bill what the suit was or in what Court and if appellant desired to connect Mrs. Lucas up with any fraud in connection with the case it was incumbent on him to make the necessary allegations, which of course he could not do. It does appear by the bill that the interest which was sold was subject to a mortgage for nearly $10,000 and that the property was leased for a long term at $6,000 a year, which would seem to indicate that the value of the entire property (all interests) figuring on an eight year rental basis, which was then the usual basis for taxation (Chilton v. Shaw, 13 Haw. 250, 252), was only about $48,000 at that time. Even if it were double that value, one-ninth of it would be only about the amount of the

outstanding mortgage, to which the ninth that was sold was subject. Also a third of the rent was to go to the widow for life, leaving only $4,000 for the nine children. Under the circumstances, who would give more than $50 for the equity of redemption and especially when the purchaser would take the ninth interest subject to being divested by the performance of the condition, when the time should come, by one or both of the other sons?

Even if a case of fraud might have been made out and taken advantage of if the appellant had acted vigilantly he of course can not take advantage of it after sleeping on his rights for nineteen and a half years (to the time this suit was begun) with full knowledge of the facts. He fails to adduce any excuse for waiting so long a time. Vigilantibus non dormientibus aequitas subvenit.

He further claims that the execution sale was void for want of notice,—stating that the judgment in the case was rendered and that the sale was made while he was absent from the Territory. It is immaterial whether he was absent from the Territory or not when the judgment was rendered or when the sale was made, so long as he was served with summons in the case. If he chose to make default he is in no position to complain. When the case was brought against him and service was made on him he should have remained in the Territory and defended the case or have engaged some one else to look after it and if judgment went against him he should have paid it instead of allowing execution to issue against his property. It is true that

he says he was without any notice thereof, that is, of the judgment and sale, but no notice thereof was necessary. Notice of the suit by due service of summons was all that was necessary. Of course the sale was duly advertised. He states also that he was without such service of summons to answer demand as is required by due process of law, but that is a mere conclusion of law and not an allegation of fact. He takes care to avoid saying that service of the complaint and summons issued in the case was not made upon him. Of course if no service of the complaint or summons was made on him the execution sale would be void, and there would be no occasion for him to come into a court of equity to seek to have it set aside. He would have an adequate remedy at law.

Further, the sale occurred in February, 1903, or nineteen and a half years ago, and ever since that Mrs. Lucas has been holding under her deed under color of title and claim of right adversely to the petitioner and hence, whether the sale might have been set aside or not at that time, she has now acquired title by adverse possession, the Hawaiian period of limitations being, since 1898, ten years in the case of land. Rev. Laws, 1925, Sec. 2657; Hilo v. Liliuokalani, 15 Haw. 507, 508. Even if the execution sale were void, it would serve as a basis for adverse possession. Lopez v. Kaiaikawaha, 9 Haw. 27, 31; Waianae Co. v. Kaiwilei, 24 Haw. 1, 7. The bill shows that Mrs. Lucas is asserting title under the execution conveyance—leasing the property, collecting the rents, &c.—and the still pending

action of ejectment (Tr. p. 44) was brought against her by the appellant and others on that theory.

The appellant endeavors to make out that the sale was of a third interest and not of a ninth interest but of course he had at that time only a ninth interest and that was all that could be sold or could pass, whatever might have been purported to have been sold, as any one upon reading the will could see, and of course whatever interest the appellant actually had would pass under the sale irrespective of whether or not the sheriff represented that he had a greater interest or purported to sell a greater interest. McCandless v. Castle, 25 Haw. 22, 25. This is recognized also by Section 2461 of the Revised Laws, 1915, cited on p. 7 of appellant's brief. The sale and conveyance was effective to the extent of the defendant's interest and the sheriff was liable to the purchaser as to any excess that he purported to sell in case the purchaser should lose such excess. The representation at the sale or in the advertisement that the interest was a third interest, if any such representation was made, would operate in apellant's favor by tending to increase the amount bid.

In the second place, the appellant, before he made the alleged tenders, entered into an agreement (Tr. p. 29) to sell to Aluli, Lane and McCandless 6/9 of all the property, which agreement also purported to convey to said parties 6/9, and (Tr. p. 38) after making the alleged tenders, he executed a deed of the 6/9 to said persons by way of carrying out his prior agreement to do so. It is true that in his original bill he sought to set aside the conveyance of the 2/9 to Aluli and Lane and in

his amended bill he seeks to set aside the conveyance of the 4/9 to McCandless, as well as of the 2/9 of Aluli and Lane, but whether he can succeed in doing so or not we need not argue but will leave that to the argument on behalf of Aluli, Lane and McCandless. Assuming, however, that he can not have those conveyances set aside, it follows that he bound himself to convey and afterwards purported to convey 6/9 of the entire property, thus showing that he had no purpose whatever of carrying out the intention of the testator, which was that the whole property should go to the performing son or sons in the male line as a family scheme. After squandering his own means and losing his own original ninth he set out on a purely speculative proposition to get 3/9 and not all the property and, at the expense and through the efforts of other persons, to do his brothers and sisters or their assignees or heirs out of 6/9 for the benefit of strangers and that, too, to do them out of what he claims to be an immensely valuable property for merely $5,000 each. Certainly that is not strict, full and literal performance of the condition or indicative of a desire or effort to carry out the testator's expressed wish and certainly no court of equity would think of helping him out in such a scheme. He who comes into equity must do so with clean hands.

V. MULTIFARIOUSNESS, MISJOINDER, ADEQUACY OF REMEDY AT LAW, LACK OF PRIOR DETERMINATION OF QUESTIONS AT LAW, &c.

Many other objections, naturally suggested by the general frame of the bill, are raised by other paragraphs of this respondent's demurrer. We shall not deal with them at length or in detail in this brief,—partly because other counsel will deal with them more fully.

Was there ever such a conglomeration of matters not only equitable but both equitable and legal combined in a single bill? The case is practically a combination of actions at law in ejectment and for mesne profits against some of the parties and suits in equity for cancellation of various conveyances made at different times under different circumstances by and to different parties who have no relation to each other, for compelling conveyances from different unrelated parties, for partition, for removal of various alleged clouds, for quieting title and for various accountings from different persons who likewise have no connection with each other.

The appellant relies in part on the general proposition that when equity takes jurisdiction for one purpose it will retain it for the purpose of disposing of all matters in controversy and in part upon the general proposition that in an equity case all parties interested in the subject matter should be joined. He seems to contend that he has a right to clear up all questions in regard to this land in a single case and that since that cannot be done in an action at law it must be pos-

sible in a suit in equity. But equity will not allow even different equitable matters to be joined in the same suit unless there is some relation between them which will make it convenient and appropriate for hearing them together, and in general it will not decide legal matters unless they are merely incidental to the equitable matters which form the principal subject of the suit, as in Kawananakoa v. Puahi, 14 Haw. 72, 77, and Keauhulihia v. Puahiki, 4 Haw. 279, 282. If the equitable matters themselves are incidental to the legal matters, equity will not decide the legal also, but will leave the parties to their remedies at law, and especially will equity take care not to go so far in passing upon legal questions as to deprive respondents of their rights to trial by jury. And, of course, distinct and primary legal and equitable matters cannot be joined. Even within the appropriate limits it is largely discretionary with a court of equity to say how far it will go, and in general such a court will not allow different parties or different causes to be joined where the result would be to work undue hardship or inconvenience upon any of the parties, as, for instance, in the matter of expense or the time required for trial, as by compelling one respondent to go through a case when he may be interested only in a distinct part of it. See, in general, 21 Corp. Jur. 62, 140, 148, 408, et seq.; Scott v. Neely, 140 U. S. 106, 109-110; India Rubber Co. v. Cons. Rubber Co., 117 Fed. 354; Stout v. Phoenix Assurance Co., 65 N. J. Eq. 566 (56 Atl. 691); Freer v. Davis, 52 W. Va. 1 (43 S. E. 164); Charman v. Charman, 18 Haw. 415; Haw. Gov't v. Haw. Tram. Co., 7 Haw. 683.

In the present case, for instance, accountings are sought from Mrs. Lucas both as an adverse claimant of certain interests and as a holder of a mortgage and from the Scott children as adverse claimants of a distinct interest. In the original bill an accounting was sought also from the Kilauea Sugar Plantation Company as a lessee in possession under others holding adversely. In the amended bill the prayer for an accounting from the Sugar Company is omitted, but that Company is still a party to the bill and one of the objects of the bill is to obtain possession of the property and mesne profits. What possible reason is there for making Mrs. Lucas a party to an accounting from the Scott children as to an interest which Mrs. Lucas does not claim and has never had anything to do with, and conversely what possible reason is there for making the Scott children and their guardian parties to a suit for an accounting from Mrs. Lucas as to matters with which the Scott children and their guardian have no connection? See Carter v. Lane, 18 Haw. 10. And how can the apellant call for an accounting in equity from Mrs. Lucas or the Scotts, with neither of whom he is in privity and where the claims are legal and where no trust is involved and where there is no complication and where he may ask for possession and mesne profits in an action of ejectment?

Without, however, going into further particulars it may be stated that the appellees materially interested belong to two general groups, namely, Mrs. Lucas, the Scott children and the Sugar Company as adverse claimants of the legal title to the several interests in the

land and in possession, whom we may call the first group and from whom the appellant seeks to recover possession and mesne profits, and Aluli, Lane and McCandless, whom we may call the second group, with whom the appellant has a dispute under certain agreements made by him with them or deeds made by him to them. What possible connection is there between these two groups and the remedies sought against them respectively? The appellant and the second group joined as coplaintiffs in the pending action of ejectment against the first group on the theory that his deeds to them were good. Now he seeks to set aside those deeds so that he may recover the entire land himself. That is a matter solely between him and them. The first group is not interested in this controversy between him and the second group. They could not and would not be permitted to take part in that controversy. The case would have to be heard in regard to that before the questions in dispute between the appellant and the first group could be considered. That would probably involve a long trial. In the controversy between the appellant and the second group, no question as to the appellant's title or the titles of the members of the first group could be raised—just as the question of title could not be gone into in a suit in equity to cancel a deed for fraud. See Kapuakela v. Iaea, 9 Haw. 555, 556. The only question would be whether his conveyances to the second group should stand or be set aside and that would involve questions solely between the appellant and the second group—their agreements, their conduct, &c. What could be more absurd than to contend

that because a party may go into equity to cancel conveyances which he himself had made to A, B and C, he can also bring in D, E and F who are in possession under claim of title from an entirely different source and who have had nothing whatever to do with the conveyances from him to A, B and C? The matters involved between the appellant and each group should be made the subject of separate suits not only because they are distinct from each other but also because one is of an equitable nature and the other of a legal nature and because the parties concerned have no connection with each other. Indeed, even if the parties were the same, equity should confine itself to the equitable question and leave the parties to an action at law as to the legal questions, as in the case just cited. See also Kaaimanu v. Kauwa, 3 Haw. 610. If appellant's view is sound, then all one has to do in order to avoid a trial at law and get into equity is to make a deed to some friend and then bring a suit in equity to set it aside and drag into the case all disputes with other unrelated parties as to the legal title.

Assuming that the appellant may pursue an equitable remedy against Aluli, Lane and McCandless for cancellation of his conveyance to them and also an equitable remedy against Mrs. Lucas for cancellation of the execution sale and conveyance to her, it does not follow that he may combine even these equitable remedies in one proceeding. These are distinct remedies against different parties for different relief and involving entirely different evidence. How much less could he combine a suit in equity against Aluli, Lane and

McCandless for undoing a transaction solely between him and them on the ground of fraud, &c., with an action at law, which it really amounts to, against Mrs. Lucas, the Scott children and the Sugar Company for the recovery of possession and mesne profits on the ground that he has the legal title under the terms of a will and by virtue of his performance of conditions prescribed by the will.

The appellant seems to contend that because all these questions or remedies have to directly or indirectly with the same land he can combine them all—on the theory that the land is the subject matter of the suit and that all persons interested in the subject matter of an equity suit should be made parties. See his brief, p. 18. As well, or indeed much better, might he contend that in Carter v. Lane, 18 Haw. 10, cited above, the appellant could call for accountings from two sets of trustees because both sets were acting under the same will—which was a much simpler case than the present. As well might he say that because the remedies all relate to the same land he might combine suits against A for an injunction to prevent interference with an appurtenant water right, against B for an injunction to prevent interference with an appurtenant right of way, against C for an injunction against trespassing on an appurtenant fishing right, against D to remove a cloud, against E for an accounting under a mortgage, against F for rents under a lease, against G for specific performance of a contract to convey or quitclaim some asserted interest in the land, against H for damages for trespass on the land, against I for pos-

session of part of the land, against J for damages for previous occupancy without right, against K for quieting the title, against L for the cancellation of a deed obtained by fraud, against M for partition, and so on through the other half of the alphabet.

The appellant's obvious course is to bring a suit or suits in equity against Aluli, Lane and McCandless for the cancellation of his conveyances to them; another suit in equity against Mrs. Lucas to undo the execution sale and conveyance to her (unless that sale and conveyance is void for want of service of process, in which case it may be disregarded in an action at law); and lastly an action or actions at law in ejectment and for mesne profits against Mrs. Lucas, the Scott children and the Sugar Company.

This of course would not be a case of multiplicity of suits to avoid which equity would or could take jurisdiction. Not the semblance of an argument can be made in support of jurisdiction on that ground either under the facts or from the nature of the questions involved in this case. The circumstances under which equity may take jurisdiction in order to avoid a multiplicity of suits are well defined in the books and do not include anything of the sort here presented.

Various other questions involved under this general heading have been passed on by the Supreme Court of Hawaii. For instance, appellant seeks partition in case it should be held that he is still entitled to a one-ninth interest but not to the other interests in the land, and yet it is well established that a partition suit will not lie until the title has first been established at law when

there is a dispute as to title. Moranho v. De Aguiar, 25 Haw. 271, 273, citing Brown v. Davis, 21 Haw. 327, 329, Kaneohe Rice Mill v. Holi, 20 Haw. 609, and Wailehua v. Lio, 5 Haw. 519.

Again, the appellant seeks to quiet title by removing clouds, etc., and yet it is well established that a person out of possession can not maintain such a bill where there is a dispute as to title until his right or title has been adjudicated at law. See Kuala v. Kuapahi, 15 Haw. 300.

Appellant endeavors to make out that he is entitled to come into equity for the purpose of establishing his title as against the first group on the authority of Sharon v. Tucker, 144 U. S. 533. The idea is that this would not be a suit in the nature of a bill of peace or of quia timet but a bill to supply a record of title analogous to a bill for restoring a lost record or supplying the want of a lost deed. But, even if he could maintain a suit against the first group on this theory, that would be no reason for combining such a suit with a suit against the second group for the cancellation of conveyances, as these are distinct matters involving distinct parties. But of course Sharon v. Tucker is not applicable to the present case. Incidentally the present bill was not brought on that theory. No doubt that case was found afterwards and the theory was a second thought. But even if the bill had been brought on that theory, the case relied upon would not support it, for in the present case the title is most emphatically in dispute and not only on questions of law but also on questions of fact while in the Sharon case there was no dispute at all

as to the title. As the court said, on page 543: "The title of the complainants is not controverted by the defendants," and, on page 544, "As the complainants have the legal right to the premises in controversy, and as no parties deriving title from the former owners can contest that title with them there does not seem to be any just reason why the relief prayed should not be granted," and, on page 548, "No existing rights of the defendants will be impaired by granting what is prayed, and the rights of the complainants will be placed in a condition to be available. The same principle which leads a court of equity upon proper proof to establish by its decree the existence of a lost deed, and thus make it a matter of record, must justify it upon like proof to declare by its decree the validity of a title resting in the recollection of witnesses, and thus make the evidence of the title a matter of record." If that case is authority in support of an equity suit against the first group then it is authority for any one, whether in or out of possession, who claims a title of which he has no record, as, for instance, by adverse possession, to sue in equity instead of at law and thus deprive the defendant of his right of trial by jury by claiming that what he wishes is to get some record made as to his title.

On most of the points covered in this portion of this brief and related points, the appellant cites numerous cases in support of general propositions but without undertaking to show that the facts are analogous to those in the present case. A few cases negativing the propriety of assuming jurisdiction in cases analogous to

this are far more relevant than any number of general statements made with reference to radically different situations. And we really do not need to go beyond the established law in Hawaii to show the absurdity of sustaining the bill in this case upon the demurrers of this respondent and Mrs. Lucas and the Scotts.

Dated at Honolulu, T. H., April 20, 1925.

Respectfully submitted,

W. F. FREAR,
FREAR, PROSSER, ANDERSON & MARX,

Attorneys for appellee Kilauea Sugar Plantation Company.

No. 4481

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

FRANK C. BERTELMANN,
Appellant,

vs.

MARY N. LUCAS et al.,
Appellees.

Upon Appeal from the Supreme Court of the Territory of Hawaii.

BRIEF FOR APPELLEES, JANET M. SCOTT, RUBENA F. SCOTT and BISHOP TRUST COMPANY, LIMITED, Their Guardian

E. A. Mott-Smith,
Attorney for Janet M. Scott, Rubena F. Scott,
and Bishop Trust Company, Limited,
their guardian, appellees.

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I.

These respondents demurred to the amended bill of complaint of petitioner filed herein with the Circuit Judge of the Fifth Circuit, Territory of Hawaii, alleging various grounds of demurrer which grounds of demurrer were together with the demurrers of other respondents herein all and each and every one of them sustained by the Circuit Court of the Fifth Circuit, Territory of

Hawaii. The case then went on appeal by petitioner to the Supreme Court of the Territory of Hawaii, and the demurrers of respondents, including these, sustained on two grounds mainly, that is multifariousness and adequate remedy at law. The matter now comes to this Court on appeal by petitioner from the decree of the Supreme Court of the Territory of Hawaii.

A complete statement of the case may be found in the opinion of the Territorial Supreme Court (Tr. pp. 134-144).

These respondents demurred on thirteen grounds (Tr. pp. 108-112).

Inasmuch as several of the other respondents demurred, upon similar as well as other grounds especially the Lucases (their brief pp. 1-5), this brief will be confined to the following grounds set forth in the demurrer below of these respondents. It is urged however that inasmuch as one or the other of the respondents have together taken up with these respondents all the points of demurrer of these respondents as well as separate demurrers of separate respondents that this Court pass on all the points of demurrer presented in the several briefs of respondents and to this end and for the assurance of these respondents the brief for respondents Mary N. Lucas and Charles Lucas, and the brief for respondent of Kilauea Sugar Plantation Company, are hereby adopted and made a part of this brief.

1. The amended bill of complaint does not set forth sufficient nor any facts to entitle the petitioner to any relief in equity.

3. Petitioner, if he has any remedy at all, has a full, adequate and complete remedy at law.

4. The amended bill of complaint is multifarious.

5. That there is now pending another suit between petitioner and these respondents, concerning the same matters and things alleged in the amended petition.

9. Catherine Scott having deceased, and the estate of which she was seized being now vested in her children, they cannot now be divested of their said estates.

Grounds 1, 3, 4 and 5 of this demurrer may be argued together.

We agree with and adopt the reasoning and contentions of counsel for respondents, Mary N. Lucas and Charles Lucas as to misjoinder of defendants, multifariousness, action pending at law, no jurisdiction to construe will, laches, remedy at law, trial by jury, no equity in bill, tender, and their comments on *Sharon vs. Tucker*.

We also agree with and adopt the reasoning and contentions made by counsel for Kilauea Sugar Plantation Company, that appellant did not perform the condition imposed by Clause III of his father's will and because of his conduct could not perform that condition nor carry out the true intent of his father's will.

Assuming as we must, for the purpose of the demurrer, that the amended petition states the true state of conditions existing between petitioner and respondents, for which petitioner is seeking remedies in this suit, we find that the suit is directed chiefly against the following classes of respondents:

Class 1. Mary N. Lucas and her husband, Charles Lucas.

Class 2. Janet M. Scott, Rubena F. Scott, and Bishop Trust Company, Limited. This class we will hereafter refer to as "the Scott minors."

Class 3. L. L. McCandless, Noa W. Aluli, and John C. Lane.

Class 4. Kilauea Sugar Company.

The grievance of petitioner against these different classes of respondents and the prayers for relief against them may be briefly stated as follows:

Class 1. The 7/9 undivided interest in the lands involved in this controversy, claimed by Mary N. Lucas (i. e. 5/9, acquired by her from five of the daughters of the late C. Bertelmann, and 2/7 acquired from two of the shortcoming sons) was divested from Mary N. Lucas and vested in petitioner on October 30, 1916, when petitioner performed the conditions of his father's will by making due and legal tender to Mary N. Lucas of $35,000.00 or $5,000.00 for each of the 1/9 interests claimed by her.

Since October 30, 1916, therefore, Mary N. Lucas has been wrongfully in possession of the lands of petitioner, taking the rents thereof which amount to $42,000.00.

Petitioner therefore prays:

(a) That Mary N. Lucas be required to keep from the rentals collected by her since October 30, 1916, the sum of $35,000.00, the same being the amount that petitioner is required and did offer to pay to her on October 30, 1916, in order to divest her of her 7/9 interests.

(b) That Mary N. Lucas be required to convey and quit claim to petitioner, said 7/9 interests.

Another ground of complaint against Mary N. Lucas is that she is asserting title to the 1/9 interest in the land originally inherited by petitioner under his father's will. Mary N. Lucas claims to have acquired this 1/9 interest under an execution sale on the 7th day of February, 1903. Petitioner alleges that this sale was void because it was made upon a judgment which was void because by implication no service of process was ever made upon him in the suit on which the judgment was based; also because the price realized for the land under the execution sale was grossly inadequate; also that the right, or executory devise, which petitioner owned in said lands, was not then subject to be sold.

Petitioner alleges that said purported deed is a cloud upon his title and prays that the same may be cancelled and set aside.

As another ground of complaint against the respondent, Mary N. Lucas, it is alleged that on August 13, 1902, petitioner mortgaged his 1/9 interest to Mary N. Lucas to secure a loan. Under the terms of the mortgage the mortgagee was to receive petitioner's share of the rents and apply the same towards the payment of the mortgaged indebtedness. This mortgage has never been foreclosed, and the rents collected by Mary N. Lucas have amounted it is alleged to more than sufficient to satisfy the loan.

Petitioner therefore prays that Mary N. Lucas be required to account to petitioner for the rents received.

Class 2. The Scott minors.

Catherine Scott having died prior to the expiration of the lease to Kilauea Sugar Company, the estate that had vested in her became vested in these minors. Although petitioner was not required by the terms of the will to pay these minors anything to divest them of their estates and to vest the same in petitioner, petitioner says he did make tender of $5,000.00 on the Bishop Trust Company, Limited, guardian of these minors.

By reason of such tender the estate of said minors in a 1/9 undivided interest in the land was divested and became vested in petitioner. Notwithstanding the divestment of their estates, the minors have wrongfully remained in possession and collected rents amounting to $6,000.00.

While petitioner was willing to pay the minors $5,000.00, although he did not consider them legally entitled thereto, he is not now willing to pay them that sum unless the court should find that they are legally entitled thereto.

He therefore prays:

(a) That the court determine whether as a matter of law these minors are entitled to be paid $5,000.00.

(b) If the court shall find they are entitled to be paid $5,000.00, the minors should be required to keep $5,000.00 out of the $6,000.00 rents they have wrongfully collected, the same being the $5,000.00 that petitioner should pay and did offer to pay under the terms of the will; and

(c) The minors should be required to convey and quit claim their 1/9 undivided interest to petitioner.

Class 3. L. L. McCandless, Noa W. Aluli and John C. Lane.

The complaint against this class of respondents is to the effect that, in his efforts to obtain the $40,000.00 needed for payment of the 8/9 interest, he went for assistance to Lane and Aluli, who, in turn, engaged the assistance of McCandless. McCandless financed petitioner, and the $40,000.00 was contributed by him. As a consideration for this assistance, petitioner conveyed an interest in the lands to McCandless and another interest to Lane and Aluli. The assistance given by Lane and Aluli was slight and inefficient, and the risk assumed by McCandless was little, and the only reason that petitioner agreed to make these conveyances was because of his dire necessity. The bargain thus forced upon petitioner was unconscionable, and the Court should find that, although these conveyances upon their faces appear to be deeds, they are in fact mortgages.

Prayer that the deeds to McCandless, Lane and Aluli should be set aside and petitioner should be required to pay McCandless what is due him under the mortgage and Lane and Aluli what their services are reasonably worth.

Class 4. Kilauea Sugar Company.

Against this respondent, petitioner alleges that it has been in possession since the estates of Mary N. Lucas and the Scott minors were divested, and is therefore liable to petitioner for the use of the lands which petitioner alleges to be $100,000.00 and for which he prays judgment.

II.

ATMOSPHERE OF THE CASE.

The rights and estates of all who took under Bertelmann's will have been fixed and determined by two proceedings before the Territorial Supreme Court and one proceeding before the Ninth Circuit Court of Appeals. There is now no question of the quantity of estate or nature of right taken by any and all of those persons the will of Bertelmann seeks to benefit. The six daughters of the testator surviving at the death of the testator took vested estates of one-ninth each. The three sons surviving the testator each took similar estates. The estates thus given the sons and daughters were however subject to be defeated if one or more of the sons conformed to the condition subsequent proviso of the will. This provision is found in clause III of the will. If none of the sons so conformed then the major part of the estate under clause IV was to be equally divided among sons and daughters and their heirs by right of representation.

The real and only question in this case is whether any of the sons have conformed to the proviso of clause III of the will. Two of the sons admittedly have not so conformed. The remaining son Henry, the petitioner herein, has attempted to do so but has he done so? Can he convince a court of equity that he has done so?

By and large the testator entertained the hope, a hope more paramount than the future well-being of his female issue, that one or more of his male issue would carry on the estate the testator had won and devised not for the benefit of a stranger or strangers but in advancement of

family name—family advancement as represented in male issue. The testator did not desire that the patrimony should be shared with strangers, nor that the patrimony should be the subject of spoils. Rather than this he desired that if all his sons failed, the property should be divided equally among all his children who survived him not excluding grandchildren by right of representation, as provided in clause IV of his will.

Henry Bertelmann has failed to conform to the wish and hope of his father. His brothers failed before him. The father's plan has been wrecked not through any provision the father has made in the will but through the act of the sons—and particularly the last of the failing sons—Henry, the petitioner in this case. And the father had the prevision to provide in clause IV of his will that in case of such failure his natural wish and intent be carried out, the division of the property equally among his sons and daughters and their heirs by right of representation.

And now Henry comes into a court of equity and asks relief but upon what record. At the time of his father's death and under the terms of his father's will he possessed two things under certain provisions of his father's will—one a vested estate in one-ninth in the bulk of his father's property and two, a right or privilege to become vested in and with nine-ninths of the same property by doing certain things prescribed by clause III of the will.

What was the first thing he did in an attempt to conform to his father's fond and exclusive wish and desire. Not long after the death of his father he mortgaged his one-ninth (or as it was then conceived his one-third

interest) and with it his privilege or option under clause III of the will. He began shortly after his father's death to conform to his father's wish by mortgaging his birthright. He followed that, a little later, by allowing an execution to be taken on his birthright by which he was deprived thereof so it appeared at the time and did not otherwise appear till fourteen years later when by judicial interpretation of his father's will (Lucas vs. Scott minors decision of this Court in 239 Fed. 450) it was ascertained that not only had he not parted with his birthright but that he could not part with his birthright, that his birthright was not assignable, that the privilege or option which he had was non-assignable. Yet he tried to part with it soon after his father's death.

After so mortgaging his birthright in 1902 and allowing the same to be sold on execution in 1903, he permitted the situation or condition, hopeless by his own acts of non-conformity with his father's wish, to run along fourteen years till 1916. On November 15, 1915, the one year period began to run within which any one or more of the sons of the testator could exercise the privilege accorded any one or more of them under clause III of the testator's will.

What was the situation at that time? The testator had nine children. Seven of them, five daughters and two sons, had improvidently sold their birthright to Mary N. Lucas. The eighth, Henry Bertelmann, the petitioner in this case, had mortgaged his birthright to Mary N. Lucas, and had permitted Mary N. Lucas fourteen years previously to purchase what was left of that

birthright on an execution sale. The ninth, Catherine, had not parted with her birthright. Therefore it appeared in the light of that day that all the Bertelmanns had parted with their interests except Catherine. But Catherine having shortly theretofore died and Mary N. Lucas having concluded, though erroneously as it afterward turned out, through this Court's decision as reported in 239 Fed. 450, nevertheless in the light of that day Mary N. Lucas concluded that she had acquired not only the vested interest of all of the eight others than Catherine, of Christian Bertelmann's children but the privilege conferred in Art. III of the will on all or on one or more of the three sons and in consequence thereof made a tender on the minor children of Catherine and on their guardian, the Bishop Trust Co., Ltd., as a basis of a claim to defeat the vested estate of Catherine and of her minor children acquired under her father's will, said vested interest being fixed and determined by this court in the Kahilina case. The issue was submitted to the Supreme Court of the Territory of Hawaii (Scott vs. Lucas, 23 Haw. 338, and to this Court, 239 Fed. 450) upon a submission of facts as between said minors and Mary N. Lucas resulting in the decision of the Territorial Supreme Court that the condition of performance as provided in clause III of the will became impossible of performance through the death of Catherine and hence Mary N. Lucas could not defeat the estate which had vested in Catherine's children—the Scott minors; and resulting in a decision of the Ninth Circuit Court of Appeals that while not disaffirming the decision of the Territorial Supreme Court as to impossibility of per-

formance and citing many authorities as to literal conformance with a condition subsequent which would divest a present vested estate may be an indication of this Court's thought on the point of impossibility of performance, decided that the privilege accorded the sons was a personal one and one not assignable to strangers of the family, a point which the Territorial Supreme Court found unnecessary to pass upon in view of the fact that it found that impossibility of performance was sufficient to determine the case. The decision referred to, of the Ninth Circuit Court of Appeals, informed Mary N. Lucas in no uncertain terms that she could not divest the heirs of Catherine on the ground of non-assignability of the privilege as had the decision of Territorial Supreme Court informed Mary N. Lucas that she could not divest the heirs of Catherine for the reason that through Catherine's death the condition became impossible of performance—a matter which has become *stare decisis* since 1916.

The decision of the Ninth Circuit Court of Appeals breathed new life into the breast of Henry Bertelmann after 14 years of somnolence. He suddenly discovered that it was impossible for him to mortgage or sell or part his birthright, his right to perform, because his father had so pre-determined for him.

Then and in the light of that what did he do? The day before the last day of the period in which he could perform he entered into an alleged unconscionable bargain to the detriment of the only daughter Catherine who was true to the family hope. He bartered his birthright with a stranger—entered into an actual agreement with a stranger or strangers, McCandless, Aluli and

Lane, that the estate should be treated as spoils and agreed that the spoils should be divided between them. And now this man, now that the "thieves" have fallen out (I am speaking metaphorically), the petitioner in this case asks this court to do him equity.

III.

ADEQUATE REMEDY AT LAW.

From an examination of the amended petition, it is clear that if the allegations therein are true, with respect to performance under clause III of the will, the petitioner would have a full, adequate and complete remedy at law against the Lucases and Scott minors and their tenant the Kilauea Sugar Plantation Company, who are in possession.

If the facts set forth in the amended petition are true in this respect there can be no question but that an action of ejectment or a statutory action to quiet title would give petitioner full, adequate and complete relief.

Under the facts pleaded, these respondents are either lawfully seized and possessed of an undivided one-ninth interest in these lands and as such are legally entitled to receive and enjoy one-ninth of the rents, issues and profits derived from the same, or they are wrongfully in possession of said lands and, since the 30th day of October, 1916, have been wrongfully receiving a 1/9 share of the rents.

Were plaintiff to bring an action at law against these respondents the issues would be plain, the remedy simple,

and the cause confined to performance under clause III of the will.

In such a case the questions involved would be few. Petitioner in his petition has set forth that Catherine, the mother of the Scott minors, was seized of a 1/9 undivided interest and that, upon Catherine's death, that interest was inherited by her minor children. Had Catherine not died the interest of which she was seized might have been divested by the payment to her of $5,000.00 within one year after the expiration of the lease to Kilauea Sugar Company. The only questions, therefore, that would have been presented in an action of law would have been—

(a) Was the estate of these minors defeasible by the payment to them of $5,000.00; and

(b) Did petitioner pay, or make a lawful tender to pay, these minors the sum of $5,000.00 within the prescribed time under clause III of the will.

If both of these questions were on joined issue answered in the affirmative, judgment would be for petitioner for the recovery of the land wrongfully withheld, together with damages for the wrongful detention, which damages would be the rents illegally collected by these respondents.

And these respondents would not be required to quit claim their interests to petitioner for they would have no interest to quit claim. If the allegation of petitioner that the estate of these minors was divested and became vested in him is a correct statement of the law, these respondents have been and are now nothing but mere trespassers.

From the amended petition, the outstanding claim of petitioner is that, because he has performed the condition subsequent contained in clause III of his father's will, the estates that had vested in his brothers and sisters and their heirs and assigns have been divested by his tender and petitioner is now seized in fee simple of the lands in question, but those persons, notwithstanding that their estates have been so divested, continue wrongfully in possession and refuse to yield possession to petitioner.

His case against the Scott minors is under the will of his father and with respect to that he has a complete remedy at law.

And petitioner has himself recognized that, as against these respondents, he has a full, adequate and complete remedy at law for, as shown by his amended petition, he has now pending an action of law against these respondents for the recovery of the lands that are involved in this proceeding, a suit which he is afraid to prosecute because by his own acts he has imbroiled himself with others.

Upon that state of facts the main case of petitioner is predicated! It happens, however, that in the course of his transactions concerning these lands, petitioner has entered into obligations with McCandless, Lane and Aluli, which he now finds onerous, matters of his own doing in which the Scott minors have had no participation, and which he asserts were forced upon him because of his straightened circumstances. These parties respondents who are in possession of the lands to the extent of a one-ninth interest under their grandfather's will

claiming to be vested in fee of the same, have no interest nor connection in the remotest degree with the controversy between petitioner and McCandless, Lane and Aluli, nor with petitioner's imbroglio with the Lucases with respect to petitioner's mortgage to them or the rights they acquired under an execution sale.

The Scott minors have the constitutional right to have a trial by jury, so far as their interests are concerned yet petitioner contends that because he has one right of action against the Scott minors to recover possession of their interest under their grandfather's will in lands and another right of action against McCandless et al. to have certain instruments set aside, and against Mary N. Lucas for accounting, etc., he may join these actions in one, go into a court of equity and be awarded several different kinds of relief, and thus deprive the respondents, the Scott minors, of their constitutional rights.

(See authority cited by counsel, A. G. M. Robertson, for Mary N. and Charles Lucas—his brief pp. 50-56. The person who wrote that brief was formerly Chief Justice of the Supreme Court of the Territory of Hawaii; and, may I step aside for a further pleasantry, the person who wrote the brief herein for the Kilauea Sugar Plantation Company is W. F. Frear, seven years Chief Justice and nearly seven years Governor of this Territory.)

IV.

MULTIFARIOUSNESS.

Multiplicity of actions is defined by Bouvier to be "Numerous and unnecessary attempts to litigate the same right."

Assuming that the allegations in petitioner's amended petition are all true, it would not be necessary for petitioner to bring "numerous and unnecessary attempts to litigate the same right."

According to his petition, petitioner has a right to recover possession of the lands from those whom he alleges are in possession together with damages for the detention thereof. It would not therefore be necessary to bring numerous actions, for one action at law against those in possession would be all that was necessary to determine who was entitled to possession.

It is true that courts of equity sometimes assume jurisdiction of a case to avoid a multiplicity of suits where it appears that there is one general right to be established against a great number of persons, but in the case at bar there is not one general right to be established against the various respondents.

"In the main, however, it seems to be now generally admitted that multiplicity does not mean multitude, and that equity will not interfere where the object is merely to obtain a consolidation of actions, or to save the expense of separate actions. Some community of interest in the various adversaries sought to be joined in one equitable action must exist to warrant such interference."

R. C. L. Vol. 10, page 282. Section 27.

There certainly is no community of interest between the respondents Lucas and the Scott minors and the other respondents, McCandless et al. The former respondents are in nowise interested nor concerned in the matters alleged against the latter respondents, and, should this action proceed to trial, these two classes of respondents would not resort to nor have similar defenses.

We submit that if ever a bill in equity offended against the rule against multifarious pleading, the present bill is a good illustration. Here we have visited upon these Scott minors a complaint that contains forty-seven pages of matter as to which they are not interested in anything that could not readily have been pleaded in one or two pages.

As already pointed out, the whole of petitioner's complaint against these respondents is that they are wrongfully in possession of the land of petitioner. For the settlement of this question these respondents have the constitutional right to a trial by jury, and petitioner has a full, adequate and complete remedy at law.

Under what theory then can these respondents be deprived of their right of trial by jury and be compelled to join in vexatious litigation concerning other parties with whom they have no community of interest?

What interest have these respondents in the alleged right of action of petitioner against McCandless, Lane and Aluli, and why should these respondents be put to the annoyance and unnecessary expense of defending against matters with which they have no connection?

The test of multifariousness is well stated in note *3 page 196, Vol. 14, Enc. P. & P.* thus:

"Where there is a demand of several matters of a distinct and independent nature in the same bill, rendering the proceeding oppressive because it would tend to load each defendant with an unnecessary burden of costs by swelling the pleading with the statement of the several claims of the other defendants, with which he has no connection"—

See Alexander v. Alexander, 85, Va. 353.

See also *Enc. P. & P. Vol. 14, page 197,* the definition given for multifariousness:

"The improper joining in one bill of distinct and disconnected matters, and thereby confounding them."

V.

MISJOINDER.

As has already been remarked, in the amended petition there has been an improper joining of many distinct and disconnected matters. This is apparent on a glance at the very title to the amended petition, which is called, a bill to (1) Remove Cloud from Title to Land, (2) For an Equitable Accounting, (3) For Cancellation of Instruments, (4) To Compel Reconveyance and Delivery of Possession, and (5) For other and Incidental Equitable and Legal Relief Necessary To Remove Cloud From and To Quiet Title to said Land.

The amended petition itself shows (1) that these respondents (the Scott minors) have cast no cloud upon the title to these lands, (2) neither is an Equitable Accounting due nor prayed for as between these respond-

ents and petitioner. (3) No instruments are of record that affect the relationship between these respondents which require cancellation, nor is any such relief prayed for as against these respondents. (4) Nothing has been conveyed to these respondents, hence there is nothing for them to "Reconvey," and the only part of this long complaint as suggested by the title, with which these respondents might be in any way connected or concerned, is called "Delivery of Possession."

VI.

LUCAS VS. SCOTT ET AL., 23 H. 338.

Catherine Scott having deceased, and the estate of which she was seized being now vested in her children (the Scott minors) these children cannot now be divested of their said estate.

If this court should be of the opinion that the amended petition has set forth sufficient facts to entitle petitioner to relief in a court of equity, that the relief that might be afforded petitioner at law is not full, adequate and complete, that the amended petition is not bad for multifariousness, and that the demurrer should not be sustained by reason of the fact that there is another suit pending between the parties in which the same questions of law are involved, there remains a controlling reason why the demurrer of these respondents should be sustained, viz, the fact that, as appears by the pleadings, Catherine Scott in whom a 1/9 undivided interest was vested, has died, her interest has been inherited by her

minor children, and that interest cannot now be divested.

In the case of *Bertelmann* v. *Kahilina* reported in *14 H. 378,* and referred to in paragraph 3 of the amended petition, petitioner and Henry, his brother, brought an action in the Supreme Court of this Territory against their mother and several of their sisters (not including Catherine) for the construction of the will of C. Bertelmann, deceased. The questions involved in that proceeding were (1) what estate in these lands did the widow take under the will? and (2) what estates did the children take under said will?

The court specifically answered these questions by holding in the following language that:

"The widow has a life estate in one-third of the land, subject to be divested by the performance of the conditions prescribed in the third item, in which case she will thereafter have a fixed sum of $2000.00 a year, which will be a charge on the land.

The children have equal vested estates in fee, subject to the widow's interest, defeasible as to the interests of the daughters and shortcoming sons upon the performance of the prescribed conditions by the other son or sons, the sons having meanwhile contingent executory devises as to such interests."

Petitioner in his amended petition says that the above holding by the Supreme Court is the law of this case and we agree with him.

Petitioner, however, in paragraph 3 of his amended petition says that in the above case the court held that—

"each of the estates of said daughters and shortcoming sons would be divested from them and, *if any were not surviving at said time, from his or her heirs or assigns, and* vest in the son or sons performing the conditions

prescribed upon the performance thereof by one or more of said sons."

This is an incorrect statement, for the Supreme Court did not nor indeed could not have made any such holding.

The court made no reference in its holding to the *heirs* of any deceased sister nor was that question before the court for there are no "heirs" to the living and when that decision was rendered none of the sisters of petitioner had died. The question whether the sons were required to pay $5,000.00 to the heirs of a daughter who did not survive the expiration of the lease was not before the court for consideration. It was not in fact considered, either elaborately or scantily. Not a word of discussion on the subject is to be found in the Kahilina decision. The holding of the court, as we have said, in no way referred to "heirs," the exact language of the court being—

"defeasible as to the interests of the daughters and shortcoming sons." (not a mention of "heirs.")

It is true, and petitioner's counsel seems to make much of this point, that the learned Chief Justice in stating the questions presented and reasoning thereon, stated by way of supposition that the performance of the prescribed conditions by the sons might "divest the daughters and shortcoming sons or their heirs," but such a statement is mere dictum and falls far short of being a holding to that effect. The *holding* of the court is in the exact language we have set forth, which was of course entirely correct, for in that proceeding the interest that the heirs of a deceased sister might take in the estate were

not, nor could not be involved. The only interests that the court was concerned with, or for that matter, in which any person was then concerned, were the respective interests of the widow and children, all of whom were then living.

It is of course elementary that the decision of a court is only authority on points which were at issue, and in Bertelmann v. Kahilina, the question as to the rights of "heirs" of deceased persons was certainly not in issue.

Paragraph 3 of the amended petition makes mention of the case of Lucas v. Scott et al., which is reported in 23 H. 338. In that case the question of the rights of the heir of a deceased sister was squarely presented for judicial determination.

The petitioners in that case were the present respondents (Scott minors), the respondent being Mary N. Lucas who is one of the present respondents. It is true that petitioner was not made a party to that case and the question involved is not res judicata as to him.

The decision of the court in that case, however, in stare decisis, and settles the law as to the rights of the heirs of Catherine Scott, for that was the precise question involved.

In that case, the contention made by the respondent that, because of the death of Catherine Scott, before the expiration of the lease to Kilauea Sugar Co., her minor children (Scott minors) had no interest in these lands, was not upheld by the court, and the court reaffirmed its decision in Bertelmann v. Kahilina to the effect that the defeasance of the vested remainder in the daughters depended upon a condition subsequent, the payment to

each daughter of the sum of $5,000.00 *at the time and in the manner prescribed in the will.* (The italics are ours.)

The court held (see page 342) that the death of Catherine Scott, prior to the termination of the lease,

"rendered the condition subsequent, whereby the estate which vested in her should be divested, impossible of performance. There is no provision in the will whereby the estate so vested in Mrs. Scott should be divested in any mode or manner other than the one prescribed in the will itself, i. e., the payment to her of $5,000.00, a privilege granted to the sons, or one or more of them by the testator. That condition becoming impossible by the act of God is as though it were never made. The plaintiffs inherited from their mother the estate bequeathed to her by the will and vested in her as decided by the former decision of this court. That vested estate could only be defeated by a strict and literal performance of the condition prescribed."

Citing numerous authorities; and again, on page 343,

"We have examined a large number of decisions, both English and American, and find them all in harmony with the rules herein announced. It follows that the plaintiffs inherited from their mother the estate in the lands in controversy vested in her by the will of her father, freed from the condition subsequent whereby the same could be divested if their mother was now living. Under the conclusion at which we have arrived the sons or either of them, cannot now defeat the estate which vested in the mother of the plaintiffs in her lifetime by reason of the provisions of the said will, which descended to and vested in the plaintiffs."

The court further held that the privilege of buying out the interests of the daughters was a personal privilege that could be performed by the sons only and that personal privilege could not be assigned, hence the respondent, Mary N. Lucas, could not acquire that privilege.

The case of Scott v. Lucas was taken by Writ of Error to the Ninth Circuit Court of Appeals. See 239 Fed. 450.

That court affirmed the decision of the Supreme Court of the Territory of Hawaii, agreeing with our local court that the privilege of the sons to buy the interest of the daughters at a fixed price, was intended to be personal to the sons, and not transferable to another, and that therefore Mary N. Lucas could not by paying the heirs of Catherine Scott divest these minors of their estate in the lands. That being the case it was unnecessary for the court to consider whether the sons' right to acquire Catherine's interest ceased with Catherine's death as being thereby rendered impossible of performance.

Although the Ninth Circuit Court of Appeals did not specifically sustain the judgment of the Supreme Court of Hawaii on this phase of the case, an examination of the opinion of the Apellate Court indicates that that court had no fault to find with the rule laid down by our Supreme Court, but on the contrary it is highly evident that the Apellate Court agreed with the opinion of the lower court. The Appellate Court agreed with our Supreme Court in its two former judgments to the effect that the condition whereby the sons might divest the daughter's interests was a condition subsequent and that, page 456,

"Compliance with that condition was absolutely necessary before the estate of the daughters could vest in the sons, for it is apparent from the will that the testator did not intend that the daughters' estate should vest in

the sons *unless the conditions were fully and literally performed*", (Italics are ours.)

and again on page 457,

"Conditions subsequent, working a forfeiture of the estate conveyed should be strictly construed, as such conditions are not favored in law, and are to be taken most strongly against the grantor to prevent such forfeiture"—

and again quoting 30 Am. & Eng. Encl. of Law 802, the court said,

"Conditions subsequent are considered literally in order to save, if possible, the vested estate or interest. A contingency divesting a prior vested interest must happen literally."

And see the many authorities cited by the court in its opinion.

That the heirs of Catherine Scott cannot be divested of their estates by the payment to them of $5,000.00 or any other sum of money has been specifically and definitely settled by this court. It is true that, on appeal to the Ninth Circuit Court of Appeals, that court did not pass upon this phase of the question, but the fact remains, that the judgment of the Territorial Supreme Court on this question stands unreversed and, as far as that court is concerned, that judgment constitutes the law of this case.

Should the court have any doubt of the correctness of this doctrine and be of the opinion, notwithstanding the decision of the Territorial Supreme Court that this court may, under the pleadings in this case consider the question involved in that decision, we submit that

the judgment of the Territorial Supreme Court in Scott vs. Lucas was correct and should be followed by this Court.

In support of this contention we call the court's attention to the many cases cited by the Territorial Supreme Court in Scott vs. Lucas and to the cases cited by the Ninth Circuit Court of Appeals in 239 Fed. 450.

We, therefore, respectfully submit that, for the many reasons urged herein, the demurrer interposed on behalf of these respondents should be sustained.

Respectfully submitted,

E. A. MOTT-SMITH,
Attorney for Janet M. Scott, Rubena F. Scott and Bishop Trust Company, Limited, their Guardian.

Dated, Honolulu, Hawaii, April 30, 1925.

No. 4481

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

FRANK C. BERTELMANN, Appellant

vs.

MARY N. LUCAS, et al, Appellees.

Appeal from the
Supreme Court of the Territory of Hawaii.

REPLY BRIEF OF APPELLANT.

HOWARD HATHAWAY,
NORMAN D. GODBOLD,
Honolulu, T. H.
Attorneys for Appellant.

In the United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

FRANK C. BERTELMANN, Appellant, vs. MARY N. LUCAS, et al, Appellees.	Appeal from the Supreme Court of the Territory of Hawaii.

REPLY BRIEF OF APPELLANT.

ANSWERING BRIEF OF MARY N. LUCAS AND CHARLES LUCAS.

In the opening brief (p. 13 to 18) appellant cited some of the numerous authorities holding that all parties having an interest in the subject matter of an equity suit should be made parties, and followed those citations with others defining what is the subject matter of a suit. We are now convinced from the authorities, having found none to the contrary, that the property in relation to which this suit is being prosecuted is the subject matter.

The Appellees say on page 14 that "The subject matter of a suit is not the physical property whose ownership is disputed, but the controversy as to title," and in support thereof cite two authorities. The first is the case of State vs. Muench, 117 S.W. 25, a special proceeding in which a writ of prohibition directed to a

Circuit Judge was issued. The court quoted at p. 29, "The subject matter of a suit, when reference is made to questions of jurisdiction, is defined to mean 'the nature of the cause of action and the relief sought.' "

The second is the case of Reed vs. Muscatine, 73 N.W. 579, which was an action at law to recover damages for personal injuries, and the court there said in passing on the question of jurisdiction, "The subject matter is the right which one party claims against the other, and demands judgment of the court upon."

No land, no thing, no chattel was the subject matter of either of said actions.

Out of the thousands of cases involving misjoinder and multifariousness learned counsel have selected those cited in their brief as most nearly sustaining their position. Without taking up the time of the court with a review of each of them, we insist that a comparison of the facts in the case at bar will clearly distinguish them.

It will be noted that in raising any apparent objection to prosecuting this suit in equity and against all of the litigating respondents counsel never present the case in its entirety but invite the Court's attention to one particular angle of the controversy. That is not the way to reach a just conclusion. As we pointed out in our opening brief (p. 33) the lower court followed counsel for appellees and never did consider the case as a whole. We there said: "An examination of the opinion will disclose that the court failed to consider as bearing on this question, the pendency of the action of

ejectment wherein McCandless and associates are parties; that the common source of any title involved is the will of Christian Bertelmann; that all parties are interested in the construction of the will, and in the application of its construction to the facts that have since arisen; that each of said parties is interested in the subject matter, and in the results of the suit; that petitioner could not get a complete record title without resort to this court; that petitioner could not get complete relief in any other way; that any separate suit would leave petitioner in a situation which would be embarrassing and inconsistent with equitable principles; that such a suit would involve questions a determination of which would affect the interests of the other parties." Counsel have not denied, and they can not deny that we are right in this statement.

Counsel, on the authority of Tribetts vs. Ry. Co., 12 So. (Miss.) 32, seek to repudiate the doctrine that a mere community of interests in the question of law and fact involved in the controversy is sufficient to justify equity jurisdiction to prevent a multiplicity of suits. For authority to the contrary we refer to Commodores Point Terminal Co. vs. Hudnall, 283 Fed. 150 (at p. 174); note 131 Am. St. Rep. at p. 40; Hale vs. Allison, 188 U.S. 56; Montgomery L. & P. Co. vs. Charles, 258 Fed. 723, and authorities there cited; Commonwealth Trust Co. vs. Smith, 69 Law Ed. U.S. 86.

In this case, however, we are not dependent on the principle stated to sustain our bill. There is more connection between the parties than "a mere community

of interests in the question of law and fact involved."

We invite the Court's attention to the "review" by appellees of the case of Commonwealth Trust Co. vs. Smith, 69 L.Ed. U.S. 86. They ignore completely the following announcement of principle by the Supreme Court in passing on the question as to who were necessary parties in that case: "Of course they were, if they had such an interest in the matter of controversy that it could not be determined without either effecting that interest or leaving the interests of those who were before the court in a situation that might be embarrassing and inconsistent with equity. Shields vs. Barrow, 17 How. 130, 139, 15 L. Ed. 158, 160."

If appellant had sued Mrs. Lucas and/or the Scotts, a decision as to whether or not appellant had complied with the terms of the will would affect McCandless and associates. If he brought action against McCandless and associates, the other litigating parties could embarrass him by moving on the pending ejectment suit for trial, and in order to prevent that embarrassment it would be necessary to bring them in as parties and injoin the suit at law.

Counsel in presenting their side of the case have not answered, or even referred to what we have said with reference to the application of said authority (Ib. 69 L. ed. 86) to the case at bar (our Brief 35-36), and have signally failed to distinguish it.

Appellees content themselves with the bare assertion that in this suit the issues between appellant and the different parties "would have to be tried just as sep-

arately as they would if they were made in seperate suits, because the nature of those issues and the evidence concerning them would be entirely distinct and unconnected." In our opening brief, pages 28-31, we called attention to the fact that the same evidence covering the main point in this case would have to be taken in any separate suit, and appellees have failed to answer the argument there advanced.

If by the tender in performance of the conditions prescribed by the will appellant acquired legal title from Mrs. Lucas and the Scotts; and if thereby the preceding estates were terminated, and all instruments purporting to convey any interest therein were of no effect in so far as appellant's newly acquired title is concerned; if appellant is not entitled to have those various instruments which are of record cancelled as clouds on his title; if appellant is not entitled to conveyances, nor to a decree of court, in order to perfect his record title; and if McCandless and associates are not interested in the tender in performance; if appellant can retain his bill against McCandless and associates without making the others parties in order to prevent a trial of the ejectment suit before a determination of the equities; if as against Mrs. Lucas and the Scotts his only right of action is for possession and for rents; if all of these concur, the bill is objectionable, and appellant should be required to amend or have his bill dismissed.

On page 38 of their brief appellees say, "If the alleged tenders to Mrs. Lucas and the Scotts were prop-

erly made and thereby the petitioner acquired equitable interests in the land, we concede that a bill to compel conveyances would be in order and that in that case a court of equity could incidentally construe the will in deciding whether the petitioner was a 'shortcoming' son." We appreciate this concession as it makes it unnecessary to further discuss those questions. Appellees also say (pages 39-40), "On page 79 of their brief, counsel for the Appellant point out a distinction between an estate upon condition and a conditional limitation. Mrs. Lucas, as the grantee of the several daughters of the testator took whatever the daughters had to convey. It seems to us that the estates of the daughters were conditional limitations. But if they were estates upon condition, then, upon the law cited in the Appellant's brief, the Petitioner should have made an entry in order to defeat them." From which it appears that counsel for these appellees agree with us that Mrs. Lucas acquired "whatever the daughters had to convey" which included of course the right to be paid $5000. for each interest. It is also clear that they, like ourselves, have some doubt as to whether the estates of the daughters were conditional limitations or estates upon condition, they now inclining to the former conclusion, whereas heretofore they were inclined to the latter. We do not assume counsel mean that in the case of an estate upon condition they are of the opinion an entry is necessary to confer an **equitable** title. We have seen no authority to that effect, and counsel do not cite any.

Learned counsel say (p. 59), "If the testator had not cared whether the sons would have the land he would not have made the provision as he did. **He certainly did not wish his daughters' estates to be defeated by land speculators or contingent fee lawyers."** If they refer to the efforts of Mrs. Lucas to acquire the whole of these lands at a nominal price we follow them. For a stranger like Mrs. Lucas to acquire this plantation for a small consideration and defeat the will of the testator is indeed foreign to his wish as expressed in his will. They use the words "land speculators" advisedly. Mrs. Lucas speculated on the interests of the daughters and short-coming sons before the time for performance of the condition arrived. She has speculated on the inability of a son of the testator to "furnish, produce or raise" the necessary money with which to purchase the other interests. She has speculated on the performing son's failure to find her hiding place when the time came to pay the money. She has speculated on securing from the sons their personal privilege to acquire the whole of the land. She is now speculating on a possible mistake of the performing son in having offered the money to her instead of to his sisters and brothers whose entire rights in the premises she has used every effort to obtain. If counsel refer to these facts they are right in saying the testator did not intend that land speculators should defeat the estates of his children.

While Mrs. Lucas stands out preeminently as the "land speculator," counsel doubtless meant McCandless and associates, as they couple "contingent fee lawyers"

with "land speculators." As we have stated, these parties took advantage of petitioner's necessity and drove an unconscionable bargain. They seek to get two-thirds of petitioner's land for services, including the use of $40,000.00 for purpose of tender, all of which is worth perhaps less than $5,000.00.

We fully agree that it would not be in accord with the intent of the testator for either of said land speculators or contingent fee lawyers to win in this suit.

Appellees say (p. 60), "The testator's intention clearly was that the payment of $5000. should be made by the son or sons personally to the daughters and short-coming sons personally." We do not agree with this assertion, and have searched their brief in vain for logical reasoning to sustain this position. However, if appellees were right, as we stated in our opening brief (88 to 91), the daughters and short-coming sons had waived the right to be paid and had estopped themselves from claiming it; furthermore, they have been made parties to this suit and are not contesting. Counsel have not denied the force of our argument on this point, nor have they questioned the correctness of our conclusions.

We have urged in our onpening brief that if petitioner had made a mistake and tendered the money to the wrong people equity would relieve him against a forfeiture of his rights. We have also insisted that if petitioner had been prevented from performing by violent means, if he showed a readiness and willingness to perform, he would be entitled to relief in equity. Oppos-

ing counsel have not replied to these arguments, contenting themselves with taking the position that there must be a strict and literal performance which could only be accomplished by payment to the living daughters and short-coming sons. If their position is correct, although a son might be ready and willing to perform, if prevented by any means whatever from actually paying the money to the right parties, his right to purchase would be forfeited. We respectfully insist that this is a narrow and technical construction of the conditions imposed by the will, and not in accord with the intent of the testator as expressed therein, nor in harmony with the former decision of this court.

COMMENTS ON BRIEF OF KILAUEA SUGAR PLANTATION COMPANY

As throwing light on the general attitude of appellees in this case, one of the illuminating suggestions in this brief is found on page 3 thereof where counsel join in the request of appellant that this court decide the fundamental questions involved **provided the decision is against the appellant.** In other words, this indicates that it is not justice and equity they desire but a short cut to a final determination that a stranger to the will has defeated the wish so dear to the heart of the testator, and has by money-power and strategy, as arrayed against the characteristic trust and innocence of a descendant of the Hawaiian race, wrested from him for a small consideration a plantation of considerable value.

We do not ask for Appellant any such inequitable and one-sided consideration. With that inherent kindness of heart and love of justice found among his people, Appellant asks this court to decide the vital questions involved whether such decision be for or against him.

Appellee seems to base this one-sided request upon the theory that it would be easier for this court and for counsel if such decision went against Appellant, as the case would thereby be terminated without the trouble of going into other questions involved. Not for one moment does the appellant countenance the suggestion that the court or counsel would, under any circumstances, select the easy way at the expense of justice, or be influenced to any degree by such a consideration.

Counsel charge (Brief p. 24) that appellant "squandered what he had at the outset." We respectfully submit the charge is not justified by the record, nor (if we may be permitted to digress) by facts outside the record. It is true he mortgaged his interest to Mrs. Lucas, and was sued for a small amount while out of the Territory, but this does not justify the serious reflection upon him which is necessarily involved in the charge that he "squandered" his property. Appellee also refers to an alleged scheme on the part of appellant "to do his brothers and sisters or their assignees or heirs" out of the land (Brief p. 31). If there is any scheme to "do" anyone disclosed by the record it is the inequitable scheme by which Mrs. Lucas, a stranger to the will, sought to defeat the will of the testator and acquire

the plantation while she was holding as trustee for a performing son (Opening Brief p. 58 to 64). (Appellee has not questioned the correctness of the conclusion that she was holding as trustee, nor cited any authority to the contrary). The other outstanding "scheme" to "do" anyone, if any such is shown by the record, is the effort of McCandless and associates to acquire a two-thirds interest in the property in controversy by driving an unconscionable bargain. We respectfully submit learned counsel are not justified in making the charge that appellant is seeking to "do" anyone out of anything. The record discloses an honest effort on the part of appellant to acquire that which he believes to be justly his, and if in seeking to accomplish that result he was driven to seek aid of those who took advantage of his necessity, it is indeed a misfortune but not a crime. Appellee insinuates that appellant has not come into equity with clean hands but neglects to refer to any fact bearing out his unjust insinuation. At this stage of the case we feel that a counter charge would be puerile and out of place. Appellant has come into court offering to do equity to all parties.

Appellee urges that the performance of the condition would ipso facto bring about the transfer of the estate; the effect of which is to say that if petitioner acquired any title by the tender in performance it was a legal title. And yet counsel have urged and the courts seem to have held that the estate taken by a son or daughter in the first instance was an estate upon condition, not a conditional limitation, and as said in 18 C. J.

301, an estate dependent upon a condition is not terminated ipso facto by the happening of the event upon which it may be defeated, while in the case of a limitation it passes at once upon the happening of the event which fixes the limitation. The following authorities there cited sustain the text: Hess vs. Kernen, 149 N.W. 847; Cumberland County vs. Buck et al, 82 Atl. 418; 1 Washburn Real Property 457-461; 2 Blackstone 155. The rule for determining the question is set forth in the cited authorities. This question is discussed in our opening brief, pages 78-81 and 90-95.

We contend that appellant is properly in a court of equity whether he acquired a legal or an equitable title by the tender in performance.

Elsewhere (Opening Brief p. 85 to 109) we have anticipated counsel's argument that the tender should have been made to the daughters and shortcoming sons personally.

With reference to Catherine's interest, we there called attention to the following words of this court in the case of Lucas vs. Scott, 239 Fed. 450, at page 455: "The 'daughters or surviving daughters' referred to in article third are not the daughters who shall survive the lease, but those who shall survive the testator." "If the testator's purpose had been otherwise, he would have indicated by the word 'then' in article third **that the surviving daughters whose rights the sons might purchase were those who survived the lease.**" Catherine survived the testator, therefore this court has already decided that a perfoming son could purchase her

interest. Counsel have spent much time and space in insisting that Catherine's interest could not be purchased after her death, but please note an entire absence of comment with reference to the quoted words of this court even after we insisted in our Opening Brief (p. 117) that the question was decided.

On page 14 of brief in its behalf this appellee says, "appellant's inference that a conveyance by a short-coming son or daughter of his or her ninth interest to Mrs. Lucas would carry with it the right to be paid the $5000" is obviously a mere conclusion. It is evident from the averments of the bill (Tr. p. 11) and from the facts before the court in the case of Scott vs. Lucas, that the daughters and short-coming sons conveyed to Mrs. Lucas every right they had in the premises. Unfortunately the conveyances from them to Mrs. Lucas were not attached to the bill as exhibits, and we are not permitted to go outside the record, but it is averred in the bill that said parties had sold to Mary N. Lucas their right to be paid $5000. each under the conditions of the will (Tr. p. 11).

Notwithstanding this averment counsel say (Brief p. 17), "They did not transfer or relinquish their right to the $5000 in case it should be paid. If they had they naturally would have asked a higher price xx." There is nothing in the record which even indicates that they did not ask **and receive** a higher price because of the transfer and relinquishment to which counsel refer.

While we have discussed this point we insist that even if there was no averment in the bill other than

that the daughters and short-coming sons, except Catherine, had sold their interests in the land to Mrs. Lucas, it would be sufficient to sustain our position as the right to be paid the $5000. went with the land.

Counsel have not attempted to answer our argument that the daughters and short-coming sons had waived any right they had to receive the $5000. each, had estopped themselves by conveyances from claiming it, and after being made parties to this suit had suffered decrees pro confesso to be entered. (Appellant's Brief 88 to 91). Neither do they deny that equity has jurisdiction to relieve appellant if he made a mistake and tendered to the wrong people.

Counsel call attention to a manifest error in the citation of authorities on page 84 of our opening brief. The authorities there cited are applicable to other points involved; and some of those intended to be there cited with reference to option contracts and the respective rights of parties thereunder are: Hildreth vs. Shelton, 46 Cal. 383; 27 R.C.L. 560-563 and cases there cited; Smith vs. Bangham, 104 Pac. 689.

On page 25 of its brief this appellee insists that in order to purchase the other interests under the terms of the will a performing son must perforce own his original base fee at the time of performance. No such condition is imposed by the will. If all three sons had sold their vested interests they could yet perform by paying the daughters $5000. each. Appellee asks if they would have to tender or pay their own assignees. Certainly not. Counsel have urged that the language of the will is to

be literally and strictly construed in so far as it relates to the performance of the condition, and that payment must be made directly to the daughters and not to their assignees or heirs. Then, how can they now insist that it would not be a strict and literal performance if the surviving sons paid $5000. to each of the daughters? By what logic do they now arrive at the conclusion that a new clause not written in the will was there by necessary intendment? We submit they are not consistent. The assignees of the sons could only acquire an estate upon condition, as that was all their grantors could convey. The performance of the condition (the payment of $5000. to each of the daughters) would put an end to the preceeding estate according to all the argument elsewhere in appellee's brief. Of course we do not agree with counsel that the condition precedent must be so strictly and literally construed as to over-ride the manifest intent of the testator. While this court (239 F. p. 457) did announce the general principle that conditions subsequent working a forfeiture, should be strictly construed, yet on page 454 you said, "Having become convinced of the general purpose of the testator, we are to be guided by that rather than by arbitrary or technical rules."

It should be borne in mind that when this court rendered the opinion in said case it was on an agreed statement of facts containing the following: "Mary N. Lucas, the plaintiff in error, has by various conveyances acquired all the right, title and interest of the three sons and the five living daughters of the testator under

the will" (239 F. at p. 451).

Counsel insist that the Sheriff levied on and sold petitioner's equity of redemption, and that such was the interest purchased by and conveyed to Mrs. Lucas by the Sheriff. **Such was not the case.** It is averred in the amendment to the bill (Tr. 81) that the sheriff "attempted to convey to the said Mary N. Lucas all the interest which petitioner would have in the lands in controversy in the suit after the expiration of the lease to the Kilauea Sugar Company, describing the same as a one-third interest." No present interest was sold or conveyed. As expressly stated in the conveyance, the attempt was to sell and convey an interest which it was expected Frank Bertelmann would have after the expiration of the lease to the Sugar Company, and said contingent interest was not subject to levy and sale.

Counsel complain (Brief p. 21) that we ignore altogether the case of Scott vs. Lucas, 23 Haw. 338. On pages 68 to 73 of our opening brief will be found quotations from and comments on that decision. We do not agree with counsel that it is stare decisis on either of the two points considered. In the first place petitioner was not a party; in the second place it was submitted on an agreed statement of facts which was untrue in part; and, in the third place this court held directly to the contrary on one of the points, and, although saying in the opinion that "We need not pause to consider whether or not the court below correctly held that the sons' right to acquire Catherine's interest ceased with Catherine's death, as being thereby rendered impossi-

ble of performance," yet we insist this court really decided the principle which would control that point when you said on p. 455 of the opinion, "If the testator's purpose had been otherwise, he would have indicated by the word 'then' in article third that the surviving daughters whose rights the sons might purchase were those who survived the lease."

The court did not pause to consider this point any further for the additional reason that the court was incorrectly informed that Mrs. Lucas had acquired by conveyances all of the right, title and interest of all the sons and daughters, except Catherine, and neither of the sons was a party.

We have heretofore considered the question of laches (Appellant's brief 40-45), and avoid further repetition.

It is respectfully submitted that appellee has carefully refrained from reference to our arguments showing that it would be utterly impossible for appellant to get adequate relief at law, or by separate suits. We urged (Brief 18-19) the interest of parties, and (Brief 21-22) showed why they would probably all have to be brought in if a separate suit was filed, and yet counsel content themselves with citing authorities where the facts were entirely different from those in the case at bar, and in which there were no such complications as face this appellant. Counsel ask (His brief p. 32), "Was there ever such a conglomeration of matters not only equitable but both equitable and legal combined in a single bill?" Just here counsel have inadvertently touched upon a potent reason for the exercise of equity

jurisdiction. A conglomeration is "an accumulation into a mass," and carries with it the idea of "a collection cemented together." And that is just the situation in which appellant finds himself. He is face to face with a number of matters and parties cemented together into a mass. He must attack the whole "conglomeration" or give up in despair, as it is outside the range of possibility to break the cement and divide the collection. Indeed, "A court of common law can give no relief in such a case, and if equity cannot do it then is the case a hopeless one."

The parties to this suit are so united by the pending action of ejectment, the tender in performance, and interest in the subject matter, that it would be impracticable, if not impossible, to proceed otherwise than by joining them.

ANSWERING BRIEF ON BEHALF OF APPELLEES ALUI AND LANE.

The agreement made by appellant with these appellees and McCandless is set out in the record (Tr. 29 to 34). The conveyance from petitioner to these appellees and McCandless is also in the record (Tr. 38 to 41).

It is averred (Tr. 41) that Aluli and Lane procured the execution of said conveyance by fraud, and the facts relied on are set out (Tr. 41-44).

Appellees apparently concede that we have correctly stated the law applicable to this angle of the case in our opening brief (122 to 124) as they neither comment on

the authorities there cited nor refer to any holding to the contrary.

The brief to which we are now replying purports to be on behalf of appellees, Aluli and Lane. The sole argument on behalf of the latter is contained in these words found on page 6: "Respondent Lane performed services for Petitioner." At all events it is brief if not convincing.

Counsel Aluli frankly admits that "the breach was caused by Petitioner because together with McCandless he and they wanted to get another lawyer" (p. 9), and he says further (p. 10), "The case was taken out of the hands of Aluli by Petitioner, and the delay, if any, cannot be attributed to him."

It is averred in the bill that neither Aluli nor Lane appear as attorneys on the complaint in ejectment (Tr. 45). On page 11 of his brief appellee says: "The silence of Petitioner for six years confirms our contention that he displaced the services of Aluli for Peters."

It seems to us from a review of the authorities that Aluli would at most, in the absence of fraud and unfair dealing on his part, be entitled to a reasonable compensation for services actually performed, and, **if dismissed without cause,** to damages for breach of contract. If any good and sufficient reason existed for a change of attorneys it is clear that he would only be entitled to compensation for actual services. The cases are collected in Dec. Dig., Attorney and Client, Key Nos. 75 and 134.

"A contract made by an attorney with his client in

relation to an interest to be acquired by him in the subject matter of pending litigation is presumptively fraudulent, and the burden is upon the attorney to prove the fairness of the contract, the adequacy of the consideration, and that it was in all its essential and material parts equitable, and that no undue advantage growing out of the relationship of attorney and client has been practised in its procurement."

Boyle vs. Read. 138 Ill. App. 153.

Bolles vs. O'Brien, 59 So. 133.

Petitioner offers to do equity (Tr. 38) and "to pay said Noa W. Aluli the reasonable value of his services rendered, which he prays the Court to ascertain after hearing. And if this is not sufficient offer to do equity, petitioner here now offers to do whatever the Court may upon hearing find to be equitable and right in the premises to said Aluli and said Lane and each of them."

We are not seeking to offset, at least not at this time, the evidence offered by counsel in support of his competency, said evidence being the records in cases before this court numbered 3099 and 3391, to which he calls the Court's attention in his brief at page 11.

AS TO APPELLEE McCANDLESS

We have not yet been served with reply brief on behalf of Appellee McCandless.

In the court below counsel cited authorities seeking to sustain his position on the ground that after one gets the benefit from a void contract he cannot have the con-

tract set aside in equity. A review of those cases will disclose that they are clearly distinguishable from this case.

They cited other authorities where the courts declined to set aside contracts between parties where they were freely and voluntarily entered into and no undue advantage was taken. The facts set out in the bill make those authorities inapplicable.

They did not cite any authority contrary to the principles declared in the case of Pironi vs. Corrigan (N. J.), 20 Atl. 218, where it was held: "If conveyance for land be made for a consideration in services afterwards to be performed by the grantee, and the grantee fails to perform, the conveyance will be set aside at the instance of the grantor. When confidential relations exist between two persons resulting in one having influence over the other, and a business transaction takes place between them resulting in a benefit to the person holding the position of influence, the law presumes everything against the transaction, and casts upon the person benefitted the burden of proving that the confidential relations had been, as to the transaction in question, suspended, and that it was fairly conducted, as if between strangers."

Neither did they controvert the authorities sustaining our position that a sale of property by a client to his attorney will be set aside unless the sale was fair, the price adequate and the conduct of the attorney equitable, and that the same rule will apply to a co-purchaser with knowledge of the relationship of attorney and client.

The cases they relied on in the court below to sustain their argument that there was a subsequent ratification of the conveyance to McCandless and associates by Appellant did not apply to the facts made by the bill, and furthermore there is no demurrer on the ground that the bill shows a ratification of the conveyance by petitioner. In fact all the grounds of demurrer are based on the wrong theory that Appellant claims relief against McCandless on the ground of mistake. (Tr. 117-120).

If the agreement and conveyance to McCandless and associates is allowed to stand, in the event of Appellant's success, McCandless would claim (1) four-ninths of all rents since the date of the convyeance, (2) a refund of all expenses incurred by him, with interest, (3) the $40,000. used for purposes of tender with interest thereon, and (4) a four-ninths interest in the land. If anything was due on the Lucas mortgage that must be paid out of Appellant's share.

In other words, for the use of the money for purposes of tender, McCandless is to get a four-ninths interest in the land free and clear of all expenses and charges; all expenses, including the $40,000. and interest thereon, are to be deducted from the three-ninths interest reserved to Appellant! !

AS TO THE SCOTT HEIRS AND BISHOP TRUST COMPANY

These parties have not yet served us with brief, and

we can not longer hold up this reply if same is to be printed before the hearing.

IN CONCLUSION

Although the court below discussed only two grounds of demurrer, namely, multifariousness and adequate remedy at law, the real and vital questions, a decision of which will determine the rights of the parties, are before this court and have been argued at length by both sides. We earnestly request a decision of those fundamental questions at this time. As opposing counsel have somewhere said, the appellant "is a poor man," and it is apparent from the record that this is a case of long standing. If our contention is correct, appellant is being kept out of property that should be his, in the meantime undergoing the financial strain and mental anxiety of expensive litigation. If we are wrong, then appellees are being annoyed and put to useless expense.

If the bill has equity, and we submit it clearly has, it should not be dismissed even if held to be multifarious. In that event the petitioner should be given the opportunity to amend.

It should not be dismissed on the ground that petitioner has an adequate remedy at law because a local statute provides as follows:

"Transfer of action at law erroneously begun in equity—If at any time it appears that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only

alterations in the pleadings as shall be essential. (L. 1923, C. 104, S. 1)." Sec. 2467 Revised Laws of Hawaii, 1925.

All of the parties to be affected by a determination of the vital questions involved are now before the court, and no injustice could be done to any one by a decision thereof at this time. Indeed it is to the interest of all parties, and to the courts as well, that the main points at issue be considered and determined. Three times already the Supreme Court of Hawaii has had before it questions involving the rights of some of the parties in connection with the will of Christian Bertelmann, and for the second time this Court is called upon for a decision in that regard. Not until this proceeding was instituted have all of the parties tracing their claims to said will as the common source of title, been before either of said courts in the same case.

We therefore most respectfully insist that this Court hand down an opinion which will put at rest the vital questions involved in this suit.

Respectfully submitted,

Norman D. Godbold

Of Counsel for Appellant.

Honolulu, T. H., May 1st, 1925.

No. 4484

United States

Circuit Court of Appeals

For the Ninth Circuit.

A. E. ANDERSON,

Plaintiff in Error,

vs.

THAD B. PRESTON,

Defendant in Error,

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4484

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

TEATS, LEO, City Hall, Tacoma, Washington,

TEATS, RALPH, Fidelity Building, Tacoma, Washington,

Attorneys for Plaintiff in Error.

HOGAN, JOHN C., Aberdeen, Washington,

Attorney for Defendant in Error. [1*]

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 4549.

A. E. ANDERSON,

Plaintiff,

vs.

THAD B. PRESTON,

Defendant.

AMENDED COMPLAINT.

Now comes the plaintiff, A. E. Anderson, after first having obtained leave to file this, his amended complaint, against the defendant, Thad B. Preston, for his cause of action herein says:

I.

That the plaintiff, A. E. Anderson, is a citizen of the State of Washington, residing in Tacoma, Pierce County.

---

*Page-number appearing at foot of page of original certified Transcript of Record.

That the defendant, Thad B. Preston, is a citizen of the State of Michigan and resides in the State of Michigan.

II.

That on or about the 25th day of January, 1923, the said defendant was the owner of, and in control of, with power to sell and convey and with power to contract for the sale and conveyance of timber land as follows: The Southwest quarter of the Southeast quarter and the Southeast quarter of the Southwest quarter of Section 35, Township 23, North Range 1, West, Willamette Meridian, Kitsap County, Washington, containing 2,220,000 feet of merchantable timber and also all the timber lands in township twenty-two (22), North Range 1, West, Willamette Meridian and situate in Kitsap and Pierce Counties, State of Washington, with stumpage of merchantable timber as follows:

KITSAP COUNTY.

SECTION 1.

The North quarter, in other words, the North half of the North half, containing 3,153,000 feet; [2] The Southwest quarter of the Northwest quarter and the Northwest quarter of the Southwest quarter containing 1,130,000 feet;

The Northeast quarter of the Southwest quarter containing 990,000 feet;

The Southwest quarter of the Northeast quarter containing 876,000 feet;

The Northwest quarter of the Southeast quarter containing 983,000 feet;

The Southwest quarter of the Southeast quarter containing 860,000.

SECTION 2.

The Northwest quarter containing 3,240,000 feet;

The South half of the Southwest quarter, containing 3,230,000 feet;

The Northwest quarter of the Northeast quarter containing 940,000 feet;

The South half of the Northeast quarter containing 1,443,000 feet;

The North half of the Southeast quarter containing 1,771,000 feet.

SECTION 11.

The Northeast quarter of the Northeast quarter and the South half of the Northeast quarter, containing 3,600,000 feet;

The West half of the Northwest quarter containing 3,445,000 feet;

The Southwest quarter containing 4,790,000 feet.

SECTION 12.

The Northwest quarter of the Southwest quarter and the North half of the Southwest quarter of the Southwest quarter being sixty (60) acres containing 1,380,000 feet.

PIERCE COUNTY.

SECTION 13.

The South half of the Northwest quarter containing 2,088,000 feet.

SECTION 14.

The Northwest quarter, containing 4,540,000 feet;

The Northeast quarter containing 3,738,000 feet;

The North half of the Southeast quarter containing 2,160,000 feet;

The Southeast quarter of the Southeast quarter containing 380,000 feet.

SECTION 15.

The Northwest quarter containing 4,276,000 feet;

The Northeast quarter, containing 5,805,000 feet;

The North half of the Southeast quarter containing 2,260,000 feet.

SECTION 22.

The Southeast quarter of the Northeast quarter and the Northeast quarter of the Southeast quarter containing 2,568,000 feet;

That all of the above-described timber lands contain in all 61,866,000 feet of merchantable timber. [3]

III.

That on or about the 25th day of January, 1923, the defendant, knowing that the plaintiff was a timber broker and as such procured purchasers for owners of timber, and timber lands, the said defendant having employed plaintiff in such work, on or about the said 25th day of January, 1923, entered into an agreement in writing whereby he employed the plaintiff as his agent and broker to sell and to find purchasers of the above-described timber lands for him, at the price of Three ($3.00) Dollars per thousand feet; and on such terms that would meet the view of a substantial purchaser; and in writing agreed to pay the plaintiff a commission of five per cent (5%) of the purchase price; and in said writing described the land he employed plaintiff

to sell, and the amount of stumpage merchantable timber thereon being the basis of sale of said lands as above set forth in paragraph two.

That the writing referred to herein, whereby the defendant employed this plaintiff as his broker and agent consisted of a series of correspondence had between the plaintiff herein and the defendant, T. B. Preston, in part as follows, to wit:

Ionia Michigan 1/15/23.

Dear Mr. Anderson:

We have a tract in township 22–1 West, that I think is very desirable timber. The price of this is three dollars ($3) per thousand. If you would be at all interested, kindly let me know.

Yours truly,
(Signed) T. B. PRESTON.

Tacoma, Washington 1/20/23.

Dear Mr. Preston:

In regard to the tract in 22–1 West, if you will give me the minutes of same (Township Platt or Section platt with parcels marked off) so that their would be no mistake made in descriptions, I will put it up to this party, as he is anxious for a logging chance.

I would like very much to have your terms on this tract, so that I may be able to talk to him intelligently on the condition of sale, and I presume that you pay commission out of the $3.00 per M.

Thanking you in advance for this information, I am

Yours truly,
(Signed) A. E. ANDERSON. [4]

Ionia, Michigan 1/25/23.

Dear Mr. Anderson:

Yours of the 20th inst.

I am enclosing plat of the lands in 22–1 and that was the basis of our purchase of these lands.

On sale of the lands at $3.00 per thousand there would be a 5% commission going to you. I presume terms could be made that would meet the views of a substantial purchaser.

Yours truly,

(Signed) T. B. PRESTON.

That the said plat of the lands in Township twenty-two (22), North of Range one (1), and the Two forties in Section thirty-five (35), Township twenty-three (23), which accompanied the letter of T. B. Preston of January 25, and referred to in said letter, was sent and given the said plaintiff herein for the purpose of describing fully and completely the timber lands which the defendant owned and claimed to own and which plaintiff was to sell for the said defendant. The said timber lands being checked off with a cross as to each and every forty and fractional part of a forty, by said defendant, so that the same was definite and complete in itself.

That as a part of said plat, and a part of said written agreement between plaintiff and defendant, the said defendant had written upon the said plat a memorandum setting forth the different portions or forties and the amount of merchantable timber in feet contained on each forty or fractional part of section which amount of timber

contained and was submitted to plaintiff as the basis of sale which the plaintiff was to make as the agent of said defendant. A copy of said plat together with the memorandum made thereon, with the amount of timber upon each subdivision is hereto attached, marked Exhibit "A" and referred to herein and made a part hereof. That the said lands contained in all 61,866,000 feet of merchantable timber, the basis of the sale which the plaintiff was to make for the defendant of his said timber lands. [5]

IV.

That the said plaintiff herein believing the representation of the said defendant and relying upon his statement that the said defendant owned the said timber lands and that the said timber lands contained the amount of timber represented by defendant as herein alleged, proceeded under his employment as broker to procure and obtain a substantial purchaser for all of the said tracts of timber land, who was willing, able and ready to buy all of said timber lands at the price quoted the plaintiff by the defendant, to wit: Three ($3.00) Dollars per thousand feet and upon such terms as the said defendant might require, to wit; terms "that would meet the views of a substantial purchaser." That on or about the 16th day of June, 1923, the plaintiff herein did obtain and procure substantial purchasers, to wit: Donald McFadden, J. C. Sams and J. L. Peters, mill operators and dealers in timber and timber lands, brought the said intending purchasers to the said defendant who at that time

was represented by one, W. J. Patterson of Aberdeen, Washington as the agent of the defendant, with authority to make the sale and treat with the said intending purchasers. That thereupon said purchasers proceeded to cruise all of said lands, whereupon on or about the 1st day of November, 1923, the said defendant refused to proceed with and consummate the said sale and for the first time known to this plaintiff or to the intending purchasers informed the said intending purchasers and this plaintiff, that he, the defendant, did not own all of said timber lands and owned only the following described portion thereof, to wit:

The Northeast quarter of Section 15, and the Southeast quarter of the Northeast quarter and the Northeast quarter of the Southeast quarter of Section 22, Township 22, Range 1, West. [6]

And the said defendant informed the said intending purchasers that he could not convey and could not consummate the sale.

V.

That the purchase price of said timber lands at the quoted price of Three ($3.00) Dollars per thousand feet on the stumpage fixed by the defendant as herein alleged and set forth was in the sum of $185,598.00 and that plaintiff's commission at five per cent as agreed upon on said sum was in the sum of $9279.90.

That this plaintiff has performed all his part, duties and obligations to the said defendant under his employment as said broker and the defendant is indebted to this plaintiff by reason of his em-

ployment in the sale of said land, and his procuring substantial purchasers, ready, willing and able to purchase all of said timber lands as herein set forth in the sum of Nine Thousand Two Hundred and Seventy-nine and 90/100 ($9279.90) Dollars, together with interest thereon at the rate of six per cent per annum from the first day of November, 1923.

WHEREFORE plaintiff prays judgment against the said defendant in the sum of Nine Thousand Two Hundred and Seventy-nine and 90/100 ($9279.90) Dollars, together with interest thereon at the rate of six per cent per annum from the 1st day of November, 1923, together with the plaintiff's costs and disbursements herein.

TEATS & TEATS,
Attorneys for Plaintiff. [7]

State of Washington,
County of Pierce,—ss.

A. E. Anderson, being first duly sworn on oath, deposes and says: That he is the plaintiff named in the above-entitled action; that he has read the foregoing amended complaint, knows the contents thereof and that the same are true as he verily believes.

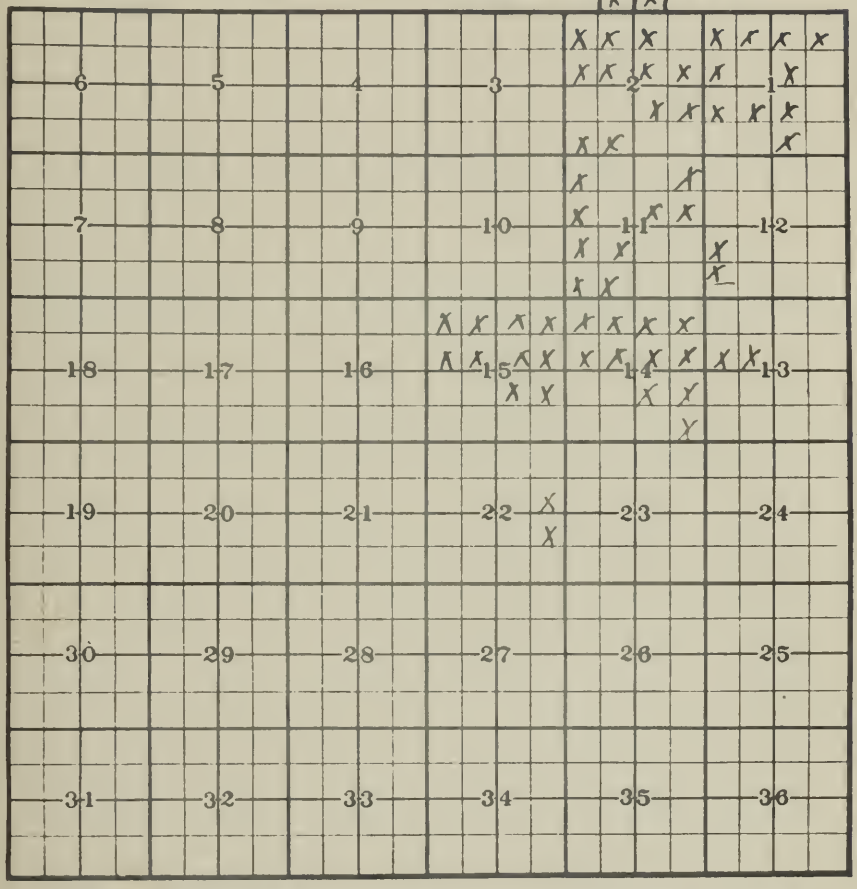
A. E. ANDERSON.

Subscribed and sworn to before me this 28th day of November, 1924.

[Seal] RALPH TEATS,
Notary Public in and for the State of Washington,
Residing at Tacoma. [8]

EXHIBIT "A"

Township 22 North ..... Range 1 West, W. M. .....



Township Plat—1 inch scale. Form 78.

PIONEER BLDY. & PTG. CO., TACOMA - 10-22—2M

NE¼ - Sec. 1 -- 3153,000
SW - NW - 1 &
NW - SW - 1 -- 1130,000
NE - SW - 1 -- 990,000
SW - NE - 1 -- 876,000
NW - SE - 1 -- 983,000
SW - SE - 1 -- 860,000
NW - - 2 -- 3240,000
S½ - SW - 2 -- 3230,000
NW - NE - 2 -- 940,000
S½ - NE - 2 -- 1443,000
NE - SE - 2 -- 1771,000
NE - NW -11 &
S½ - NE -11 -- 3600,000
NW - NW -11 -- 3445,000
SW - -11 -- 4790,000

60 A. Sec. 12 -- 1380,000
S½ - NW - 13 -- 2088,000
NW¼ - 14 -- 4540,000
NE¼ - 14 -- 3738,000
N½ - SE - 14 -- 2160,000
SE - SE - 14 -- 380,000
NW¼ 15 -- 4276,000
NE¼ - 15 -- 5805,000
N½ - SE - 15 -- 2260,000
SE - NE - 22 &
NE - SE - 22 -- 2568,000
80 A. - 35 -- 2220,000

(61,866,000)

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Nov. 29, 1924. F. M. Harshberger, Clerk. By E. Redmayne, Deputy. [10]

DEMURRER TO AMENDED COMPLAINT.

Now comes the defendant in the above-entitled cause and demurs to the amended complaint of the plaintiff herein upon the ground that said complaint does not state facts sufficient to constitute a cause of action against this defendant.

JOHN C. HOGAN,
Attorney for Defendant.

Served by mail on Dec. 16, 1924, on Teats, Teats & Teats, Attorneys for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Dec. 26, 1924. F. M. Harshberger, Clerk. By E. Redmayne, Deputy. [11]

ORDER SUSTAINING DEMURRER TO AMENDED COMPLAINT.

This cause coming on to be heard upon the demurrer of the defendant to the amended complaint, and the plaintiff appearing by his attorneys, Teats & Teats, and the defendant appearing by his attorney, John C. Hogan, and after hearing the arguments, the court being fully advised,—

IT IS ORDERED, that the said demurrer be and the same is hereby sustained,

To which ruling of the court the plaintiff excepts and his exception is allowed.

Dated January 2, 1925.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 3, 1925. Ed M. Lakin, Clerk. By E. Redmayne, Deputy. [12]

JUDGMENT.

The above-entitled cause coming on regularly to be heard upon the demurrer of the defendant to the amended complaint of the plaintiff herein, and the plaintiff appearing by his attorneys, Teats & Teats, and the defendant appearing by his attorney, John C. Hogan, and after hearing the arguments of counsel and after due consideration, the Court being fully advised, sustained said demurrer and entered an order sustaining the same, whereupon the plaintiff through his attorneys, announced in open court that he would stand upon the amended complaint and would refuse to plead further, whereupon the defendant moved the court for a judgment of dismissal of the action with prejudice and costs which motion was granted. Therefore on motion of the defendant,

IT IS ORDERED AND ADJUDGED that this action be and the same is hereby dismissed with prejudice and that the defendant recover of the plaintiff his costs taxed in the sum of $——.

IT IS FURTHER ORDERED AND ADJUDGED that the attachment of real estate heretofore made in this action by writ of attachment issued out of the Superior Court of the State of Washington for Pierce County, prior to the removal of this cause to the Federal Court, be and the same is hereby dissolved.

Plaintiff excepts and his exception is allowed.

Dated January 10, 1925.

EDWARD E. CUSHMAN,
Judge. [13]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 10, 1925. By Ed. M. Lakin, Clerk. [14]

ASSIGNMENT OF ERRORS.

To the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes the above plaintiff in error, A. E. Anderson, by his attorneys, Teats & Teats, and says that the record and proceedings in the court below in the above-entitled cause, there is material error, in this:

1st. That the Court erred in sustaining a demurrer of the defendant therein to the amended complaint of the plaintiff therein, for the reason

that the said amended complaint states facts constituting a complete cause of action against the defendant therein.

2d. That the Court erred in rendering judgment therein dismissing the plaintiff's action at his cost for the reason that the said judgment was contrary to law.

TEATS & TEATS,
Attorneys for the Plaintiff in Error.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 10, 1925. Ed M. Lakin, Clerk. [15]

PETITION FOR WRIT OF ERROR.

To the Honorable Judge of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes A. E. Anderson, plaintiff in error, and petitions this Honorable Court to allow a writ of error to be directed to the District Court of the United States for the Western District of Washington, Southern Division to remove to this United States Circuit Court of Appeals, for the Ninth Circuit for a review thereof, the record in the case lately pending in said court below, wherein the above-named plaintiff in error was plaintiff and the above-named defendant in error, was defendant and particularly the record of the order and judgment rendered by said District Court in said cause wherein the said court below sustained the demurrer of the defendant to the amended com-

plaint of the plaintiff and rendered a judgment wherein the said Court dismissed the said plaintiff's said cause at his costs; said judgment was duly entered on record therein on the 10th day of January, 1925.

Your petitioner respectfully states that he has this day filed herewith his assignment of errors committed by the Court below in said cause and intended to be urged by your petitioner and plaintiff in error in the prosecution of this suit in error.

Dated this 10th day of January, 1925.

TEATS & TEATS,
Attorneys for Plaintiff in Error.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 10, 1925. By Ed M. Lakin, Clerk. [16]

WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to the Judges of the District Court of the United States for the District of Washington, Southern Division, GREETING:

Because in the record and proceeding, and also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between A. E. Anderson, plaintiff, and Thad B. Preston, defendant, a manifest error hath happened, to the great damage of the said plaintiff, A. E. Anderson, as by his complaint appears, and it

being fit, that the error if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Court of Appeals, for the Ninth Judicial Circuit, together with this writ, so that you have the same at the city of San Francisco in the State of California, within thirty days from the date of this writ in the said Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness, the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 10th day of January (1925), in the year of our Lord, one thousand nine hundred and twenty-five, and of the Independence of the [17] United States the one hundred and forty-ninth.

ED M. LAKIN,

Clerk U. S. District Court, District of Washington.

By ED M. LAKIN,
Clerk.

The above writ of error is hereby allowed.

EDWARD E. CUSHMAN,
U. S. District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 10, 1925. By Ed M. Lakin, Clerk. [18]

CITATION.

United States of America,—ss.

To Thad B. Preston, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein A. E. Anderson is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this 10th day of Jany., A. D. 1925, and of the independence of the United States, the one hundred and forty-ninth.

EDWARD E. CUSHMAN,
U. S. District Judge.

Attest: ED M. LAKIN,
Clerk of the U. S. District Court, Western District of Washington, Southern Division.

Service accepted this 16th day of January, 1925.

JOHN C. HOGAN,
Attorney for Defendant in Error.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 10, 1925. Ed M. Lakin, Clerk. [19]

COST BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS: That we, A. E. Anderson, as principal, and Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto Thad B. Preston, defendant herein in the full and just sum of Two Hundred ($200.00) Dollars, to be paid to said Thad B. Preston, his heirs, executors, administrators or legal representatives, to which payment, well and truly to be made, we bind ourselves, our heirs, successors and assigns jointly and severally, firmly by these presents.

Sealed under our seals and dated this 12th day of January, 1925.

WHEREAS, lately in the District Court of Washington, Southern Division, in an action pending in said Court between A. E. Anderson as plaintiff, and Thad B. Preston as defendant, a judgment was signed on the 29th day of December, 1924, and became operative as the final judgment in favor of the said defendant and against the said plaintiff, dismissing the plaintiff's cause of action, at his costs to be taxed according to law, and the said A. E.

Anderson having obtained from said Court a writ of error to reverse said judgment in the aforesaid action, and a citation directed to the above-named defendant citing and admonishing him to appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco, State of California; and [20]

WHEREAS the said Circuit Court of Appeals, for the Ninth Circuit, in allowing said writ of error, has fixed the amount of cost bond in said action in the sum of Two Hundred ($200.00) Dollars;

NOW, THEREFORE, the consideration of this obligation is such that if the said A. E. Anderson, plaintiff in error, shall prosecute his said writ to effect, and answer all damages and costs, if he shall fail to make his plea good, then his obligation to be void; otherwise, to remain in full force and effect.

A. E. ANDERSON,
Plaintiff in Error.
By TEATS & TEATS,
Attorneys for Plaintiff in Error.

FIDELITY & DEPOSIT CO., OF MARYLAND.
[Seal] J. C. ROWLAND,
Attorney-in-fact.

United States of America,
State of Washington,
County of Pierce,—ss.

AFFIDAVIT AND JUSTIFICATION.

On this 12th day of January, 1925, before me personally came I. C. Rowland, known to me to be

the resident attorney-in-fact of the Fidelity and Deposit Company of Maryland, a corporation described in and which executed the within and foregoing bond of A. E. Anderson and Fidelity & Deposit Company of Maryland as a surety thereon and who, being by me duly sworn, did depose and say: That he resides in the city of Tacoma, State of Washington; that he is the resident attorney-in-fact of said Company and knows the corporate seal thereof; that the said Fidelity and Deposit Company of Maryland is duly and legally incorporated under the Laws of the State of Maryland; that the seal affixed to the within bond of A. E. Anderson, as principal and Fidelity and Deposit Company of Maryland, as surety, is the corporate [21] seal of said Company and was thereto affixed by order and authority of the Board of Directors of said company and that he signed his name thereto by like order and authority as resident attorney-in-fact of said company, and that the assets of said company unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of Four Hundred ($400.00) Dollars.

I. C. ROWLAND.

(Deponent's Signature.)

Sworn to, acknowledged before me and subscribed in my presence this 12th day of January, 1925.

[Seal] H. T. HANSEN,

Notary Public in and for the State of Washington, Residing at Tacoma, Pierce County, Washington.

The foregoing bond and surety thereby offered is hereby approved this 12th day of January, 1925.

EDWARD E. CUSHMAN,
U. S. District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 12, 1925. By Ed M. Lakin, Clerk. [22]

ORDER ALLOWING WRIT OF ERROR.

Let a writ of error in the above cause issue as prayed for in the petition, upon the plaintiff in error giving and furnishing a cost bond in the sum of Two Hundred ($200.00) Dollars to be approved by the Court.

Dated this 10th day of January, 1925.

EDWARD E. CUSHMAN,
United States District Judge and One of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Residing in the Above-entitled Court, at Tacoma, Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 10, 1925. Ed M. Lakin, Clerk. [23]

ACCEPTANCE OF SERVICE.

This is to certify that the undersigned attorney of record in the above-entitled cause, for the above-

named defendant has this day received a copy of the assignment of errors, petition for writ of error and order allowing writ of error in the above-entitled cause.

Dated this 9th day of January, 1925.

JOHN C. HOGAN,
Attorney for Defendant in Error.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 10, 1925. Ed M. Lakin, Clerk. [24]

PRAECIPE FOR TRANSCRIPT OF RECORD.

Please make and certify for the Circuit Court of Appeals in the above-entitled action the following files and records, to wit:

Amended complaint.
Demurrer to amended complaint.
Order sustaining demurrer to amended complaint.
Judgment of dismissal and for costs.
Assignment of errors.
Petition for writ of errors.
Writ of error.
Citation.
Cost bond on writ of error.
Order allowing writ of error.
Acceptance of service.
Omit captions.

Dated this 21 day of January, 1925.

TEATS & TEATS,
Attorneys for Plaintiff in Error.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 21, 1925. Ed. M. Lakin, Clerk. By E. Redmayne, Deputy. [25]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing is a true and correct copy of the record and proceedings in the case of A. E. Anderson, Plaintiff, *versus* Thad B. Preston, Defendant, as required by praecipe of counsel filed and shown herein, and as the originals thereof appear on file and of record in my office in said District at Tacoma; and that the same constitute my return on the annexed writ of error herein.

I further certify and return that I hereto attach and herewith transmit the original writ of error and the original citation herein.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges as incurred and paid in my office by and on behalf of the plaintiff in error herein, for making record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's Fees (Sec. 828 R. S. U. S., for making record, certificate and return, 48 folios @ 15¢ each $7.20
Certificate of Clerk to Transcript 3 folios at 15¢ each ..... .45
Seal to said certificate ..... .20

Attest my hand and the seal of said District [26] Court at Tacoma, in said District, this 30th day of January, A. D. 1925.

ED M. LAKIN,
Clerk.
By Alice Huggins,
Deputy. [27]

[Endorsed]: No. 4484. United States Circuit Court of Appeals for the Ninth Circuit. A. E. Anderson, Plaintiff in Error, vs. Thad B. Preston, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filed February 2, 1925.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit

A. E. ANDERSON, *Plaintiff in Error,* vs. THAD B. PRESTON, *Defendant in Error.*	No. 4484

Brief of Plaintiff in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

GOVNOR TEATS
LEO TEATS
RALPH TEATS
Attorneys for Plaintiff in Error

TACOMA PTG. CO., TACOMA, WASH.

In the United States Circuit Court of Appeals for the Ninth Circuit

A. E. ANDERSON,
Plaintiff in Error,
vs.
THAD B. PRESTON,
Defendant in Error.

No. 4484

Brief of Plaintiff in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

STATEMENT

Appellant is complaining of a judgment entered in the court below after sustaining a general demurrer to his amended complaint dismissing appellant's cause of action and for costs. The facts stated in the amended complain are in substance:

That Mr. Preston owned about 58 forties of timber land in Kitsap and Pierce Counties in the State of Washington, being in township 22,-1 West with a stumpage of about 61,866,000 feet. Mr. Preston

lives in Ionia, Michigan, and Mr. Anderson is engaged in the sale of timber and timber lands in the State of Washington for owners as a broker. In January, 1923, having some customers who wanted timber lands, he wrote to Preston to ascertain whether or not he still owned certain timber lands on Hoods' Canal, not described in the complaint, which Anderson and Preston had had some correspondence about sometime before. Preston wrote back to the effect that he had a tract in Township 22-1 West that he thought was very desirable timber and quoted the price to Anderson at $3.00 per thousand and if Anderson would be at all interested to kindly let him know.

Anderson was interested because he had buyers for large timber tracts and he wrote back to Preston for a description of his lands in 22-1, township plat or section plat with parcels marked off so there would be no mistake in the description, and on receipt of this plat would put it up to his parties who were anxious for a logging chance. In this same letter he asked Preston his price and suggested also that he, Anderson, should be paid a commission. (Rec. 5). Preston replied enclosing a plat of Township 22-1 as the basis of his purchase of the lands and in that letter also stated that on the sale of the lands at $3.00 per thousand there would be a five per cent commission going to Anderson and terms could be made that would meet the views of a sub-

stantial purchaser. The plat enclosed is Exhibit "A" to the amended complaint and is found on page 10 of the record with a minute detail with the stumpage on the several forty acre tracts aggregating 61,866,000 feet. Under this written employment Anderson proceeded as Preston's agent and broker to sell and to find purchasers of his timber tracts at $3.00 per thousand, and on the 16th day of June, 1923, obtained and procured substantial purchasers, McFaddon, Sams and Peters, mill operators and dealers in timber and timber lands, and brought the said intending purchasers to the defendant who at that time was represented by one W. J. Patterson of Aberdeen, Washington, as the agent of the defendant, with authority to make the sale and treat with the said intending purchasers. That thereupon the said purchasers proceeded to cruise all of said lands, and on or about the 1st day of November, 1923, Preston refused to proceed with and consummate the said sale and for the first time known to the plaintiff or to the intending purchasers informed the intending purchasers and Anderson that he, Preston, did not own all the said timber lands but only owned a small portion of it and for that reason Preston could not consummate the sale and convey the timber lands to the intending purchasers.

Anderson asks judgment against Preston for five per cent of the quoted value of the timber with in-

terest thereon at the rate of six per cent per annum from the 1st day of November, 1923.

The letters, material to the contract and which made up the written contract with Anderson, are quoted in full in the amended complaint at Rec. page 5, 6 and 10. From these letters we have the parties, Anderson, the broker, and Preston, the owner. We have the employment of Anderson by Preston to sell his timber at the rate of $3.00 per thousand, on such terms as would meet a substantial purchaser. We have the description of the real estate complete within itself with a complete description and the amount of stumpage on the defendant's forties with a total stumpage of 61,866,000 feet. We have the agreement to pay the commission or compensation at five per cent of the value of the timber at $3.00 per thousand.

POINTS AND AUTHORITIES

STATUTE OF FRAUDS:

The contract of employment of a real estate broker authorizing and employing him to sell or purchase real estate for compensation or a commission is void unless such agreement, contract or promise or some note or memorandum thereof be in writing and signed by the party employing or some one duly authorized by him to sign the note or memorandum.

Sec. 5825, Rem. Com. Statutes of Wash., which reads as follows:

Sec. 5825—"In the following cases specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: (5) an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission."

STANDING TIMBER

Standing timber is real estate and the employment of an agent to sell standing and growing timber must be in writing and falls under provisions of this section.

Engleson vs. Port Crescent Shingle Co., 74 Wash. 424.

In this case an oral engagement was made with the plaintiff to sell timber in Clallam County. There were a few letters passed, but no provision made for the payment of a commission; and no description of property which are two elements necessary, involved in a contract of this kind. Citing:

Kieth vs. Smith, 46 Wash. 131;
Foote vs. Robbins, 50 Wash. 277;
Forland vs. Boyum, 53 Wash. 421;
Krouch vs. Forbes, 63 Wash. 564.

ESSENTIAL ELEMENTS

The writing, to satisfy the statute, must express

the entire contract and leave nothing that pertains to the essentials of the contract to be supplied by parole.

> *Engleson Case*, 74 Wash. 424 and cases cited: *Cushing vs. Monarch Timber Co.*, 75 Wash. 678, a leading case where plaintiff undertakes to collect a commission for the sale of timber and timber lands, logging roads, etc.

Essential elements are:

(1) The Parties; (2) The Employment; (3) The Description of Real Estate; (4) The Agreement to Pay Commission or Compensation; the description must be complete within itself by which the realty to be sold can be known and identified.

The court said: "Parole evidence may be resorted to for the purpose of applying the description contained in a writing, to a definite piece of property and to ascertain its location on the ground but never for the purpose of applying deficiences in a description, otherwise, so incomplete as to definitely describe any land. The description must be in itself capable of application to something definite, before parole testimony can be admitted to identify any property as the thing described."

Description by official government survey using recognized abbreviations as S. ½ of S. E. 27-11-19 is sufficient within the statute requiring a contract to be in writing.

Schmidt vs. Powell, 107 Wash. 53.

This case also follows the universal rule. The courts take judicial notice of the manner of survey, location of base, meridian lines, which are located by virtue of Acts of Congress and all the other elements in the location of sections, parts of sections, townships, ranges, etc., quoting

Carson vs. Railsback, 3 W. T. 168;
In Re Wenatchee Reclamation District, 91 Wash. 60.

As said in the Schmidt case referring to our plat accompanying the letter, "we have the description contained in the instrument accompanied by the recognition of those facts which the Court is bound to know, rendering the description full, adequate and complete. Where descriptions have been held insufficient, it has been necessary in order to determine the location of the property to add to the words and figures contained in the description information, which could only come through parole testimony, but in none of these cases (citing a long line of Wash. cases) was involved the question of whether a description, apparently insufficient, may be rendered sufficient when interpreted by the facts of which the Courts will take judicial notice.

Is the township plat and memorandum with parcels marked off and the amount of stumpage on the several parcels, a part of the original contract?

It is our contention that the intention of the parties and the reference to the same by the letters was to make the section plat and memorandum that part of the contract giving the description of the land and the stumpage upon the same necessary for the carrying out of the employment of Mr. Anderson by Mr. Preston. Mr. Anderson writes in his letter of Jan. 1st: "In regard to the tract in 22-1 West, if you will give me the minutes of same (township plat or section plat with parcels marked off) so that there would be no mistake made in descriptions, I will put it up to this party as he is anxious for a logging chance." In answer to this letter Mr. Preston wrote, Jan. 25th: "I am enclosing plat of lands in 22-1 and that was the basis of our purchase of these lands," meaning, of course, that the township plat with parcels marked off and the stumpage on the different parcels constituted descriptions and quantity of stumpage and is all necessary for the performance of the employment by Mr. Anderson. In other words, reading all the writing together as one, we have a contract of employment in writing answering all the elements of the statute of frauds. The township plat was requested by Anderson and sent by Preston and accepted by Anderson as part of the contract of employment. There is no condition as we find in some cases but was part of the natural necessary proceeding in the case of employment. While technically there are two instruments, but as a matter of law there is but one and it is the

law, that a reference in a contract or paper to another instrument or paper that contains a description of the property justified the examination of two instruments together for the purpose of identifying the particular property referred to.

Krouch vs. Forbes, 63 Wash. 564;
Gillman vs. Brunton, 94 Wash. 1;
Nance vs. Valentine, 99 Wash. 323.

LETTERS, WRITING, ETC., CONSTITUTE ONE PAPER

The Supreme Court of the U. S. said, "It is well established that a complete contract, binding under the Statute of Frauds may be gathered from letters, writings and telegrams between the parties relating to the subject matter of the contract and all connected with each other, that they may be fairly said to constitute one paper relating to the contract."

Ryan vs. U. S., 10 Sup. Ct. R. 913.

In this case the description of the land was by the usual abbreviation or fractional parts of sections and the contracts were made up wholly from letters and telegrams. See also

McCartney vs. Clover Valley Land & Stock Company, 232 Fed. 697, 8th Cir. 1st A. L. R. 1130.

This is an action by the plaintiff to recover a commission as real estate broker for the sale of the company's ranch. It was conceded that the Statute of

Frauds of California governed, which is almost identical with our statute. The company's headquarters was in Utah, the broker lived in Los Angeles. The contract of employment was made up entirely of letters. The plaintiff's case was dismissed mainly on the ground that no contract or note or memorandum thereof was made in writing subscribed by defendant, etc., employing the plaintiff as broker. The Cir. Court of Appeals held, reversing the District Court:

"The correspondence is an ample note or memorandum of the contract employing plaintiff to satisfy the California Code. It has been the uniform holding of the courts of that State that this statute does not require any formal contract. The "writing" which it demands may be embodied in letters and telegrams. All that is necessary is that the fact of employment be expressed in writing, signed by the party to be charged or by his agent." Citing a number of California cases. "These decisions are in accord with the general rule on the subject in this country and England."

From these letters we have the written memorandum contract or agreement of Preston, authorizing and employing Anderson as agent or broker to sell real estate for a commission, as follows:

This is to certify that I have this 25th day of January, 1923, employed and authorized A. E. Anderson, of Tacoma, Washington, to sell timber lands

in Township Twenty-two North, Range One West, W. M., in Mason and Pierce Counties, Washington, being 58½ forty acre tracts marked off on the township plat hereto attached and referred to as a definite description, the said timber lands containing about 61,866,000 feet of timber; the sale of said lands to be at $3.00 per thousand; on terms that would meet the views of substantial purchasers. The said Anderson to receive on the sale of said timber lands a 5% commission.

(Signed) T. B. PRESTON,
Ionia, Mich.

(Township plat giving definite description being same as on Record page 10, which we wish read into this contract without printing in this brief).

WHEN BROKER EARNS COMMISSION

The broker was entitled to his commission although the sale was defeated through the act of the owner, or the owner chose to deal with the purchaser on other terms.

Carsten vs. McReavy, 1 Wash. 359;
Barnes vs. German Saving, 21 Wash. 448;
Norman vs. Hopper, 38 Wash. 415.

In the case of *Norris vs. Byrne*, 38 Wash. 592, the Court announced the general rule, quoting from the Carsten case:

"Courts almost unanimously unite in holding that in case of an ordinary employment to sell, once he has procured a party able and willing to buy, upon

the terms demanded by his principal, and has notified him of the purchaser's readiness to buy, the agent's work is ended and he is entitled to his commission. It is not his duty to procure a contract or make one, and he is not in default if he fails to do either."

McGinnis vs. Forest Lbr. Co., 123 Wash. 136.

McGinnis, a commission man, undertook to sell 17 carloads of lumber for the lumber company; he to be paid a commission as soon as the cars were shipped. McGinnis found purchasers for the lumber but the cars were not shipped. The Supreme Court held, "It is the settled law, that where the broker in good faith procures a purchaser, ready, able and willing to buy on the terms fixed by the seller and the seller fails to complete the contract, the broker is entitled to his commission." The fact that the cars were not shipped is no defense, as in that case "it would permit the company to take advantage of its own wrong."

Dean vs. Williams, 56 Wash. 614.

Dean was employed as an agent to sell certain property. He produced purchasers ready, willing and able to buy and the deal fell through because of the failure of the title of the owner and the failure of the sale was due to the owners not doing things they agreed to do, to-wit: Convey the land and furnish a good title which respondent had a

right to assume appellants could do at all times. The agent having performed all his work and the sale not being consummated through the fault of the owner, the agent was entitled to his commission.

See the long line of authorities cited and quoted from in this case.

Case Note in No. 3 L. N. S. 576 on this point says:

That it is the universal rule that the agent is entitled to his commission where the sale fell through because of lack of title or defective title in the principal.

Goedfroy vs. Hupp, 93 Wash. 371.

The broker in this case was entitled to his commission although only part of the property passed in the sale. See also for different phases:

Grinnell Co. vs. Simpson, 64 Wash. 564;
Carsten vs. House, 96 Wash. 50;
Johnson vs. Dahlquist, 124 Wash. 267.

OWNER LIABLE WHEN HE ASSUMES THE MANAGEMENT OF A SALE

Where the owner assumes the management of the sale to the purchasers furnished by the agent and either consummates the sale on terms of his own or fails to do so, through no fault of the agent, the agent has earned his commission.

Duncan vs. Parker, 81 W. 340, following

Lawson vs. Black Diamond Coal Co., 53 Wash. 614, and other cases.

And where the sale was made of more land than listed or less than what was listed the commission is earned as to the land listed and the sale by the owner of more or of less of the property listed does not viciate the sale.

Miller vs. Brown, 15 W. D. 155;
Following *Duncan vs. Parker*, 81 W. 340;
L. R. A. 1915 A. 804;
Godefroy vs. Hupp, 93 W. 371.

Where change of terms are made by owner and accepted by purchaser, he still is liable for commission.

Lempke vs. Nordhy, 117 Wash. 221.

With this contract of employment Anderson produces his intending purchasers ready, willing and able to buy, and with the description of the lands furnished by Preston proceeds to cruise before purchasing the timber lands in question.

Preston employs Mr. Patterson of Aberdeen as his representative to be on the ground with the intending purchasers to arrange and consummate the deal.

The cruise was made by the intending purchasers, conferences were had between them and Mr. Patterson from time to time, when finally on or about the

1st day of November, 1923, it appears that Preston could not give title to all of said lands and could give title to only 6 forties out of the 58½ forties, Anderson was employed to sell.

We submit that Anderson, as the legally employed agent has earned his commission. And our amended complaint states a complete cause of action.

GOVNOR TEATS
LEO TEATS
RALPH TEATS
Attorneys for Plaintiff in Error

In the United States Circuit Court of Appeals for the Ninth Circuit

A. E. ANDERSON,
Plaintiff in Error,

vs.

THAD B. PRESTON,
Defendant in Error.

No. 4484

Brief of Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

JOHN C. HOGAN,
Attorney for Defendant in Error.

P. O. Address:
Aberdeen, Washington.

QUICK PRINT CO., ABERDEEN, WASH.

In the United States Circuit Court of Appeals for the Ninth Circuit

A. E. ANDERSON,
Plaintiff in Error,

vs.

THAD B. PRESTON,
Defendant in Error.

No. 4484

Brief of Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

JOHN C. HOGAN,
Attorney for Defendant in Error.

P. O. Address:
Aberdeen, Washington.

QUICK PRINT CO., ABERDEEN, WASH.

In the United States Circuit Court of Appeals for the Ninth Circuit

A. E. ANDERSON,
Plaintiff in Error,

vs.

THAD B. PRESTON,
Defendant in Error.

No. 4484

Brief of Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

STATEMENT OF THE CASE.

Plaintiff in error brought this action in the district court to recover the sum of $9,279.90, claimed by him to be due to him from the defendant in error, as a commission under an alleged executory contract, whereby the defendant employed the plaintiff as broker to sell defendant's land. The district

court sustained a demurrer to the amended complaint. The plaintiff refused to plead further and judgment of dismissal of the action was entered by the district court. It is here sought to review the action of the district court in sustaining the demurrer to the amended complaint and dismissing the action.

The district judge sustained the demurrer to the amended complaint upon several grounds, namely:

1. That there was no contract of employment between plaintiff and defendant, and that the several letters passing between the plaintiff and the defendant and which alone comprised the purported contract were insufficient to constitute a contract between the parties and were in the nature only of preliminary negotiations.

2. That the amended complaint did not state a cause of action, because its allegation as to performance, by the plaintiff, of the alleged contract was insufficient to show performance.

3. That, in any event, the purported contract between the parties as alleged in the amended complaint, was void under the statute of frauds of the state of Washington.

In this brief these three points will be discussed in the order named.

ARGUMENT AND AUTHORITIES.

I.

The district court correctly ruled that the letters, which alone comprised the purported contract between the parties, constituted preliminary negotiations only, and did not amount to a binding contract between the parties.

The plaintiff in the court below, A. E. Anderson, was a real estate broker residing at Tacoma, Wash. The defendant, Thad B. Preston, resided in Ionia, Michigan. The defendant and his associates owned timber lands in the state of Washington, in both Kitsap County and Pierce County in that state.

The purported contract between the parties consisted solely of three letters passing between them. These letters were set out in full in the amended complaint which alleged that the entire contract between the parties was embodied in these letters. The first was a letter written by Preston to Anderson on January 15th, 1923, and the second was a letter written by Anderson to Preston on January 20th, 1923, and the third and final letter was one written by Preston to Anderson on January 25th, 1923. No sale of the timber land was ever made.

The following are copies of the three letters which it is claimed by the plaintiff in error, constituted a binding contract between the parties, to-wit:

"Ionia, Michigan, 1-15-23.

"Dear Mr. Anderson:

"We have a tract in township 22-1 West, that I think is very desirable timber. The price of this is three dollars ($3) per thousand. If you would be at all interested, kindly let me know.

Yours truly,

(Signed) T. B. PRESTON."

"Tacoma, Washington, 1-20-23.

"Dear Mr. Preston:

"In regard to the tract in 22-1 West, if you will give me the minutes of same (Township Platt or Section platt with parcels marked off) so that their would be no mistake made in descriptions, I will put it up to this party, as he is anxious for a logging chance.

"I would like very much to have your terms on this tract, so that I may be able to talk to him intelligently on the condition of sale, and I presume that you pay commission out of the $3.00 per M.

"Thanking you in advance for this information, I am,

Yours truly,

(Signed) A. E. ANDERSON."

"Ionia, Michigan, 1-25-23.

"Dear Mr. Anderson:

"Yours of the 20th inst.

"I am enclosing plat of the lands in 22-1 and that was the basis of our purchase of these lands.

"On sale of the lands at $3 per thousand there would be a 5% commission going to you. I presume terms could be made that would meet the views of a substantial purchaser.

Yours truly,

(Signed) T. B. PRESTON."

After reading these letters and studying them carefully, one is irresistibly driven to the conclusion that the letters constituted merely preliminary negotiations between the parties, and were not intended to be a completed contract, because (a) the "terms" of sale were not settled, and (b) there was no acceptance by Anderson.

(a) In the first letter Preston merely informed Anderson that he had a tract of land in Township 22-1 West, which he thought was desirable timber and on which the price was $3, and asked Anderson if he would be interested. To this letter Anderson replied, simply asking for the township plat of the land, and adding: "I would very much like to know your *terms* on this tract * * and I presume that you pay commission out of the $3, per M." Preston thereupon wrote the final letter to Anderson, enclosing a plat and saying that on sale of the land at $3 per M, "there would be a 5% commission going to you," then adding, "I presume terms could be made that would meet the views of a substantial purchaser," thus showing conclusively that matters had not yet advanced beyond the stage of negotiations, but the negotiations ended there, and never did ripen into a contract, for Anderson never replied to Preston's letter. Anderson had asked Pres-

ton for the terms of sale and Preston merely replied that he "presumed terms could be made that would meet the views of a substantial purchaser." This left the terms of sale wholly unsettled. Preston's expression, "I presume terms could be made that would meet the views of a substantial purchaser," could not be construed otherwise than as an invitation from Preston requesting Anderson to propose terms such as he thought would be acceptable to a buyer that Anderson then had in view, but Anderson never replied. Preston's letter did not fix, nor purport to fix the terms of sale, and that was an essential and vital matter to be settled, and one which if the parties did not settle in their contract, the court could not settle for them. It is true that in the amended complaint, Anderson alleged that he found a purchaser willing to buy "upon such terms as the said defendant *might* require, to-wit: terms that would meet the views of a substantial purchaser," (See paragraph IV, amended complaint, T 7), but no sale was ever made. If we imagine the plaintiff at the trial, as trying to prove this allegation of the amended complaint, the absurdity of the situation is at once apparent, because the purchaser which Anderson found, might have one idea as to what the terms should be that would meet the views of a substantial purchaser, and Preston might have a very different

view of what such terms ought to be, leaving it to the court to make terms between the parties, in short, to make a contract between the parties, which the court would be without power to do. It is plain that until the parties had settled upon this important feature of the contract, governing the terms of sale, the contract was incomplete, and up to that stage, constituted merely preliminary negotiations between them, which never did enter into a contract.

It is elementary that if an offer, in any case, is so indefinite as to make it impossible for the court to fix exactly the legal liability of the parties, its acceptance cannot result in an enforcible agreement.

Where the negotiation of the contract is carried on by correspondence between the parties residing at different places, whether by letters, or telegrams, or both, the courts have occasion frequently to consider the question as to whether the transactions had, as reflected by the letters or telegrams, advanced to a stage sufficient to constitute a contract or were merely preliminary negotiations. On this point we call attention to the case of *Strobridge Lithographing Co. vs. Randall*, 73 Fed. 619, decided by circuit court of appeals of the sixth circuit. The opinion by Judge Taft and concurred in by Judge Lurton, two distinguished jurists. The syllabus in that case reads as follows:

"The S. Co. was a creditor of the firm of B. & D., and had commenced an action against the members of the existing firm, together with one R., who had recently retired from it, and who alone had been served in the action. Pending this action, negotiations were begun between the S. Co. and B. & D. for a settlement of the S. Co.'s claims, in the court of which an arrangement was made by which it was thought that, if B. & D. could get certain notes of their own, held by R., they could raise money to effect a settlement. Thereupon S., the president of the S. Co., telegraphed from New York to R., in Michigan; 'Will you turn over to us the notes amounting to $4,000 you hold of B. & D.? If so, will release the parties to the suit against B. & D., and they will get you released from all other indebtedness of the firm;' to which R. replied: 'Certainly . . . Will get them, and turn them over to you on condition of your telegram.' The settlement was never in fact made. Held, that such telegrams were merely intended by the parties as negotiations for an agreement, and did not constitute a completed contract by S. or the S. Co. and R., by which the latter was released from his obligations, as a member of the firm of B. & D., to the S. Co."

Judge Taft, in his opinion said:

"The first question that meets us in this case is whether the two telegrams between Strobridge and Randall made a contract of release. If they did not, then the judgment of the court below must be reversed, without regard to the other questions made here, of accord and satisfaction, and of Strobridge's authority to bind his company by the alleged contract of release. Mr. Justice Foster, of the supreme judicial court of

Massachusetts, speaking for that court in *Lyman vs. Robinson*, 14 Allen, 242, 254, said:

> 'A valid contract may doubtless be made by correspondence, but care should always be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation.'

"In *Ridgway v. Wharton*, 6 H. L. Cas. 238, Lord Wensleydale said:

> 'An agreement to be finally settled must comprise all the terms which the parties intend to introduce into the agreement. An agreement to enter into an agreement upon terms to be afterwards settled between the parties is a contradiction in terms.'

"In *Rossiter v. Miller*, 5 Ch. Div. 648, 659, Lord Justice James said:

> 'On a question of construction different minds may differ, but, for my own part, I have often felt that in cases of this nature parties have found themselves entrapped into contracts which they wrote without the slightest idea that they were contracting.'

"—And the same learned judge used similar language in *Smith v. Webster*, 3 Ch. Div. 56.

> "Whether correspondence with the purpose of entering into a contract is merely preliminary negotiation or the contract itself must be determined by the language used and the circumstances known to both parties under which the communications in writing were had. If it is plain from the language used that *some term which either party desires to be in the contract is not included or definitely expressed in the cor-*

respondence relied upon, no contract is made."
Lithographing Co. vs. Randall, 73 Fed. 719.

"A contract by correspondence is not complete until the communications have passed beyond the state of preliminary negotiations. The minds of the parties must have met, and it must appear that at some point in the correspondence there was a definite proposal by one party which was unconditionally accepted by the other."
13 C. J. 299.

Bowen vs. Hart, 101 Fed. 376.

In the case of *Stag vs. Compton*, 81 Ind. 171, there had been some negotiations concerning the purchase of a horse, and the defendant wrote to the plaintiff saying: "I might purchase your horse at $200, the price you ask. I would like to get it at once if it will do me, which I am quite sure it will." This message was sent in reply to a letter from the plaintiff stating the price of the horse. The court said that even if the plaintiff had replied directing the defendant to take the horse at the price named, and telling him when and how to get it, there still would have been no completed contract because even then, by the terms of this communication, the defendant was entitled to determine whether the horse would suit him.

So, in this case, even if Anderson had replied to Preston, unconditionally accepting the suggestion

made in Preston's last letter, still there would be no contract because the terms to be made to the purchaser, such as time of payment, security to be given and the like, were left open and had still to be arranged.

In *Knight vs. Cooley*, 84 Iowa, 218, in reply to a letter requesting the price of certain lots, the defendant wrote: "Yours received; the lots are so encumbered that it would be difficult to make title. Price is $1700, and $1500, net and cheap." Plaintiff replied accepting the offer and sent a draft in part payment, which the defendant returned. The court held that there was no contract and regarded the correspondence as amounting simply to negotiations and not to a binding offer.

In *Martin vs. Northwestern Fuel Company*, 22 Fed. 596, in reply to a proposition made by the plaintiff by telegraph, to sell coal at a certain figure, the following telegram was sent: "Telegram received. You can consider the coal sold. Will be in Cleveland next and arrange particulars." Judge Brewer, who decided the case, held that the telegram was merely an acknowledgment that the contract might be easily agreed upon but that the correspondence did not amount to a contract.

(b) Furthermore, Anderson never accepted

even the incomplete proposal contained in Preston's last letter. Anderson never replied to Preston's letter, never accepted the employment and never in any way bound himself by any expression whatever. Even if Preston's offer contained in his last letter had been so complete in itself as to form a proper basis for a contract if accepted, yet if Anderson never accepted it or signified an acceptance of it, there was no contract between the parties. A contract must be mutual and therefore, when a contract is made by correspondence, the offer made by one party must be accepted by the other so as to give mutuality to the contract and until this is done it is not complete and there can be no contract.

Anderson promised nothing, was not bound in any way. He assumed no responsibility. In the face of Preston's last letter, which was more in the nature of an inquiry than an offer, Anderson remained absolutely silent; he made no response at all to Preston. Even if Preston's letter had been sufficiently definite to be considered as an offer, there was never an acceptance of the offer by Anderson and without an acceptance or some commitment on the part of Anderson communicated to Preston, there could be no contract in any event.

"Before an offer can become a binding promise and result in a contract it must be accepted, either by word or act, for without this there cannot be an agreement. Nor is a promise binding on its maker unless the promisee has assented to it."
13 C. J. 272.

II.

The amended complaint failed to show performance of the alleged contract, on the part of the plaintiff, and for that reason, it did not state a cause of action, and the demurrer was properly sustained for this reason also.

It must be borne in mind that the purported contract, between these parties, always remained executory and never became an executed contract. No sale was ever made under it.

The amended complaint alleged in paragraph IV, that on June 16th, 1923, six months after the exchange of the letters, Anderson procured a "substantial purchaser" and that on November 1st, 1923, eleven months after the exchange of the letters, this "substantial purchaser" was refused permission by the defendant, to proceed with the purchase of the property. No excuse was shown in the amended complaint for the delay on the part of Anderson; even if the letters did amount to a contract, at best the allegation of the amended complaint, merely

showed that eleven months after the purported contract was made, the plaintiff tendered performance, but that the defendant refused at that time to perform on his part. The district court was right in holding that, as a matter of law, this tender came too late in the absence of any allegation of excuse or explanation for the delay.

> "What is a reasonable time within which an act is to be performed, when a contract is silent on the subject, is a question of law, and must depend upon the situation of the parties, and the subject matter of the contract."
> 6 R. C. L. 896.

III.

The district court sustained the demurrer to the amended complaint on the further ground that, in any event, the contract was void under the statute of frauds of the state of Washington, Section 5825, Remington's Compiled Statutes of Washington, which reads as follows:

> "Sec. 5825—In the following cases specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract and promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: (5) an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission."

The supreme court of the state of Washington, in construing and applying this statute, has laid down the rule that in order to satisfy the statute, the contract must be *completely* in writing, and if anything is left to be supplied by parol evidence, then the contract is insufficient. On this point, in the case of *Ingleson* vs. *Port Crescent Shingle Co.* 74 Wash., 424, the supreme court stated the rule in the following language:—

> "These cases lay down the rule that a writing sufficient to satisfy the statute must be coextensive with the stipulations of the parties; that is to say, it must express the *entire* contract *and leave nothing that pertains to the essentials of the contract to be supplied by parol.*"

Again in *Keith vs. Smith*, 46 Wash. 131, the state court, construing this statute, said:—

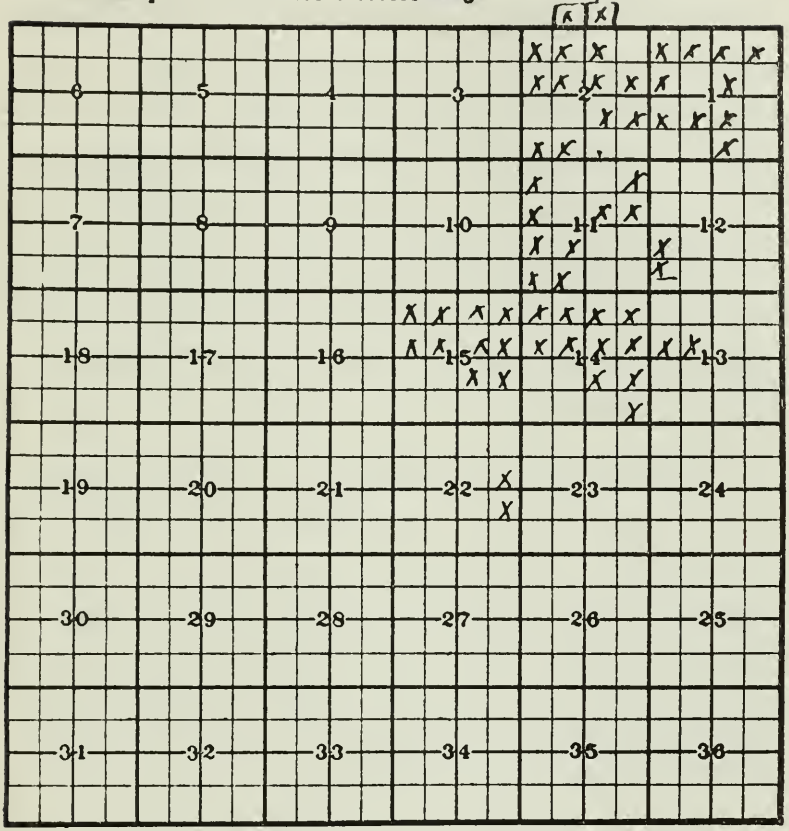
> "A contract partly written and partly verbal is a parol contract, and contracts required by law to be in writing must be wholly written to be enforceable. . . . *A material part of the contract in suit being verbal, it must be held to be an oral contract, and therefore invalid.*"

In fact, the plaintiff in error, in the case at bar, considers on pages 6 and 7, of his brief, that the entire contract between the parties, in order to satisfy the statute, must be in writing, leaving nothing to be supplied by parol evidence.

Examining the correspondence which it is claimed constituted a contract in this case, and applying to the strict rule laid down by the Washington Court, it is apparent that the correspondence is deficient in two important particulars; first as to the description of the property, and, secondly, as to the terms of sale. We will discuss these two points in the order mentioned.

1. The description of the property as disclosed by the correspondence, was insufficient to satisfy the statute and it would have been necessary to resort to parol evidence to supply the deficiency, a thing which is not permitted under the statute. The letters themselves, did not purport to describe the property, but it is contended by the plaintiff in error that the plat which Preston enclosed in his last letter to Anderson, contained a sufficient description of the property. The following is a photographic copy of that plat:

Township 22 North ..... Range 1 West, W. M.



N½	-	Sec. 1	--	3153,000
SW	-	NW - 1	&	
NW	-	SW - 1	--	1130,000
NE	-	SW - 1	--	990,000
SW	-	NE - 1	--	876,000
NW	-	SE - 1	--	983,000
SW	-	SE - 1	--	860,000
NW	-	- 2	--	3240,000
S½	-	SW - 2	--	3230,000
NW	-	NE - 2	--	940,000
S½	-	NE - 2	--	1443,000
N½	-	SE - 2	--	1771,000
NE	-	NE -11	&	
S½	-	NE -11	--	3600,000
W½	-	NW -11	--	3445,000
SW	-	-11	--	4790,000

60 A.		Sec. 12	--	1380,000
S½	-	NW - 13	--	2088,000
NW¼		- 14	--	4540,000
NE¼		- 14	--	3738,000
N½	-	SE - 14	--	2160,000
SE	-	SE - 14	--	380,000
NW¼		15	--	4276,000
NE¼		- 15	--	5805,000
N½	-	SE - 15	--	2260,000
SE	-	NE - 22	&	
NE	-	SE - 22	--	2568,000
80 A.		- 35	--	2220,000

(61,866,000)

The district court held that this description was inadequate, under the statute, in two particulars, which we will now call attention to. It will be noticed that the last item reads, "80 A-35." This is supposed to mean eighty acres of land in section 35, but no land whatever, is marked or checked in section 35, on the accompanying plat, and there would be absolutely no way of telling what eighty acres in section 35, was intended, without resort being had to parol evidence.

The second item of deficiency in the description, is the item reading, "60 A—Sec. 12." This, it is claimed, is a description of sixty acres of land in section 12, and looking at section 12, on the plat, we do find certain land marked, but the particular sixty acres could not be picked out from the marking without a resort to parol evidence.

There are other matters which the district court thought rendered the description inadequate under the statute, but the two mentioned are the most flagrant ones.

In the case of *Thompson vs. English*, 76 Wash. 23, the court held a description in real estate broker's contract, as insufficient, where it described the land as "seventy-nine acres in section 30, township

2 N., Range 3, E. W. M., Clarke Co., Wn. Owner, A. E. English." In its opinion the court said:

> "The description of the property as contained in the contract was, 'Seventy-nine acres in section 30, township 2 N., Range 3, E. W. M., Clarke Co., Wn. Owner, A. E. English.' It will be observed that this decription does not specify which 79 acres in section 30 was intended. To ascertain this fact, resort must be had to oral testimony. The description given cannot be applied to any definite property. This question has recently been before the court in the case of Cushing v. Monarch Timber Co., 75 Wash. 678, 135 Pac. 660. In that case, after reviewing the previous decisions, speaking of the description, it is said:
>
> 'The description being essential, it follows that it must be such a description as would meet the requirements of a sufficient description under any other phase of the statute of frauds, as, for instance, when invoked in actions for specific performance. It must be a description, complete within itself, by which the realty to be sold can be known and identified.' "
>
> *Thompson vs. English*, 76 Wash. 23.

On the question of sufficiency of description in such contract, all of the previous decisions of the state court were reviewed at length in *Rogers* vs. *Lippy*, 99 Wash. 312. In that case the court held insufficient this description: "my stock ranch located in sections 9, 17, and 21, township 3, south, range 13, east, Sweetgrass County, Montana." In its opinion the court said:

"It will be noticed that the description there involved was limited to land in one named section, while this description is even more general, being limited to land in three named sections. It was accompanied by the name of the owner, as this description is.

"In the late case of *Gilman v. Brunton*, 94 Wash. 1, 161 Pac. 835, there was involved the following description which was challenged as not being sufficient to support specific performance.

'Whereas, W. B. Brunton and Opal M. Brunton, parties of the first part, are the owners in fee simple of the following bounded and described property, situated in the county of Clarke, State of Washington, 48 acres, more or less, bounded on the North by Cedar Creek and situated about one mile east of Etna, Wash., said property being the same property conveyed to the party of the first part by W. Tate and wife in 1912.'

"This description not only has the owners' names in connection therewith, but a reference therein to the property as being the same as that conveyed by named parties to named parties in a certain year. Yet it was held insufficient upon the authority of *Thompson v. English*, supra. We think the manner of mentioning the owners' name in connection with or, as we might say, as a part of the description in Thompson v. English and *Gilman v. Brunton*, means in substance the same as the words 'my stock-ranch' in the description here in question, and furnished as much aid to the description in those cases as does the manner of designating the owner of the property in connection with this description."

Rogers vs. Lippy, 99 Wash. 312

2. As to the second point, namely, that the statement in the letter of Preston, "I presume terms could be made that would meet the views of a substantial purchaser," even if not objectionable for indefiniteness and incompleteness, would still be objectionable under the statute of frauds above quoted because in any event, it would require parol evidence to show what "terms that would meet the views of a substantial purchaser," ought to be. In fact, the allegation of the amended complaint, to the effect that plaintiff proceeded under the contract to procure "a substantial purchaser" to buy all of said timber lands at a price quoted the plaintiff by the defendant, to-wit: $3, per M feet, and thereupon such terms as the said defendant might require, to-wit: "terms that would meet the views of a substantial purchaser," clearly contemplated the introduction of parol evidence to show what such "terms" ought to be. This would render the contract objectionable under the statute.

We respectfully submit that the district court was correct in sustaining the demurrer and the judgment of the trial court should be affirmed.

If, however, this court should reverse the district court, then the cause should be remanded with permission to the defendant in error, to answer the

amended complaint and to join issue thereon, the cause then to proceed to trial on the issues so joined.

Respectfully submitted:

JOHN C. HOGAN,

Attorney for Defendant in Error.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EZRA ALLEN,
Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,
Plaintiff-Respondent.

Brief of Defendant-Appellant

THOMAS MANNIX, Counsel for Appellant.
E. V. LITTLEFIELD, Counsel for Respondent.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EZRA ALLEN,
Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,
Plaintiff-Respondent.

BRIEF OF DEFENDANT-APPELLANT.

This is the case of the United States of America vs. Ezra Allen, charging him with having sold three pints of whisky to a Government agent. It appears that Ezra Allen is a cab driver at La Grande, Oregon, and has been for some years. On Labor Day the Government agents, for want of something better to do, decided to entrap Ezra

Allen and arrest him for violating the Volstead Act. The Government conspirators got together and one of them gave one Pierce, who was not an agent at that time, some marked money, and he approached the defendant Allen, and asked him, as the record shows, where he could buy some whisky and whether he would buy some whisky. The evidence shows that Allen was not engaged in bootlegging and there is no evidence to show that he was ever connected either directly or indirectly with the whisky trade. However, in order to accommodate the Government agent he took the marked money and procured a pint of whisky and later on the same day further accommodated the agents and procured another pint. Later on the Government conspirators having incited Ezra Allen to buy the whisky and having made him their agent for that purpose, arrested him for their own act. The entire evidence is before the Honorable Circuit Court of Appeals, and it can be ascertained from the evidence that these are the facts.

The question in the case is whether or not Government agents can solicit and incite the commission of a crime and then arrest and convict their dupe. The leading case on the subject in this District which seems to settle the law is Peterson vs. United States, 255 Federal 433 before the Honorable Circuit Judges Gilbert, Ross and Hunt. These Federal Judges speaking through Circuit Judge Ross said:

"It is the settled rule in this Circuit that where officers of the law have incited a person to commit the crime charged, and lured him on with the purpose of arresting him in its commission, the law will not authorize a verdict of guilty."

If this be the legal major premise, the entire record will show that Ezra Allen was the victim of the over-zealousness of these officers to get the victim irrespective of either law or ethics.

The following cases will throw some further light on the legal aspects of this case:

Intoxicating liquors; is one who obtains liquor for and delivers it to another using the latter's money, guilty of selling the same.

As shown by the following cases, as well as those cited in the note to Reed v. State, 24 L. R. A. (N. S.) 268, to which this note is supplemental, the general rule is that one, who, at the request of another and with money furnished for that purpose by him, purchases from a third person, and delivers to the former, intoxicating liquors, is not guilty of making a sale, as he acts merely as agent for the real purchaser, unless it appears that he is personally interested in the sale or acts for the seller.

Reynolds v. State, 52 Fla. 409.
State v. Turner (Kan.), 109 Pac. 983.
Givens v. State, 49 Tex. Crim. Rep. 267, 91 S. W. 1090.
Killman v. State, 53 Tex. Crim. Rep. 512, 112 S. W. 90.

Schoennerstedt v. State, 55 Tex. Crim. Rep. 638, 117 S. W. 829.
Lafrentz v. State (Tex. Crim. Rep.), 125 S. W. 32.

On proof of unimpeachable witnesses that the defendant received money from another person, accompanied by a request to procure whisky with it, which he bought from a third person and delivered as requested, the defendant cannot be convicted of having on hand intoxicating liquor for the purpose of illegal sale.

Bray v. Commerce, 5 Ga. App. 605, 63 S. E. 596.

So, where the defense to a charge of violating the prohibition liquor law is that the defendant purchased intoxicating liquors for those who advanced him money for that purpose, and that he acted merely as their agent, it is error to refuse to instruct the jury to acquit the defendant if they believe the evidence in support of such defense.

State v. Turner, supra.

But a prima facie case of a violation of a prohibitory liquor law is made by evidence that the defendant was requested by other persons to procure liquor for them, receiving money from them therefor, which he shortly afterwards delivered to them, as the burden of explaining where and from whom he obtained the liquor rests upon the defendant. In this case the evidence shows that Ezra Allen received the whisky from a man and turned the same over immediately to the Government agent.

A conviction for an illegal sale in a district where the sale of liquor is prohibited cannot be sustained on proof that the defendant, at the request of and with money furnished by a third person, purchases liquor for, and delivers it to, the latter within such district, as such facts show that the defendant was merely agent for the purchases, and was not the seller or agent of the seller.

Dubois v. State, 87 Ala. 101.
People v. Converse, 157 Mich. 29.
Tate v. State, 91 Miss. 382.
State v. Lynch, 81 Ohio St. 343.
State v. Wirick, 81 Ohio St. 343.
Way v. State, 36 Tex. Crim. Rep. 40.
Brignon v. State, 37 Tex. Crim. Rep. 71.
Phillips v. State (Tex. Crim. Rep.) 40.
Kirby v. State, 46 (Tex. Crim. Rep.) 584.
Dupree v. State (Tex. Crim. Rep.) 91.

The following instruction was asked by defendant which was refused, and we submit that the refusal was error.

> *"It is not unlawful for one person to act act as the agent of another in purchasing intoxicating liquors. So that if you should find that the defendant has only acted for and as the agent of some person or persons wishing to purchase intoxicating liquors, and that the defendant was given the money with which to pay for the intoxicating liquors desired, and that he simply took the money and delivered it to a person who had intoxicating liquors for*

sale, and purchased the intoxicating liquors with the money which had been given him and then delivered the intoxicating liquors so purchased to the person who gave him the money, and who instructed him to purchase the liquors for him, then you cannot find the defendant guilty, for such acts would not be in violation of the law."

We submit to the Honorable Circuit Court of Appeals that the violation of all law should be punished with equal zeal, and one crime should not be selected for punishment more than another. True, the Volstead Act ought to be enforced with the utmost energy, but so should all other criminal laws be equally enforced, and yet many courts and persons interested in the enforcement of the criminal law believe at the present time that law enforcement means merely the enforcement of the provisions of the Volstead Act. Whereas a person who is not carried away with the clamor of the moment realizes that the enforcement of every law should receive equal attention because it is no worse to sell a bottle of whisky than it is to burn a house. If Ezra Allen had been a bootlegger, then it would have been proper to entrap him, but being a cab driver and not dealing in liquor, the case is entirely different and brings the legal solution of this case within the principle enunciated in the Peterson case. Government sleuths should not be allowed to employ stool-pigeons to purchase liquor for their own accommodation and then turn the tables by ar-

resting the innocent party. As a matter of fact, there is evidence in this case that the Government sleuths drank some of this whisky themselves, and supposedly this is a crime in itself. We do not know that the prohibition law discriminates in favor of prohibition agents and allows them to drink whisky while prohibiting it to others. Defendant should not be held in this case because the commission of the act was the direct result of the Government agents requesting Ezra Allen to purchase the liquor. There is room enough for legitimate prohibition work without the inciting to law violation.

Respectfully submitted,

THOMAS MANNIX,
Attorney for Appellant.

No. 4485

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EZRA ALLEN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the District Court of the United States for the District of Oregon.

GEORGE NEUNER,
United States Attorney for the District of Oregon.

FORREST E. LITTLEFIELD,
Assistant United States Attorney for the District of Oregon.
Attorneys for Defendant in Error.

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No. 4485

IN THE

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Attorneys for Defendant in Error.

GEO. I SMITH PRINTING CO PORTLAND, OREGON 4-27 25 40

STATEMENT OF FACTS.

Ezra Allen, Plaintiff in Error, hereinafter called the "defendant," was informed against for violation of Section 3, Title 2, of the National Prohibition Act.

The Information contains two counts. Count One charges the defendant with the unlawful possession of a quantity of intoxicating liquor and Count Two charges the defendant with the unlawful sale of a quantity of intoxicating liquor on the first day of September, 1924, at La Grande, Oregon. On November 22, 1924, after trial by jury, said defendant was found guilty on both counts. Thereafter the defendant was sentenced to a term of four months in the county jail of Multnomah County, Oregon. Defendant has sued out a Writ of Error and has alleged in support thereof in his Assignments of Error, that the Court erred in its refusal to give instructions requested by defendant relating to entrapment. Said instructions are as follows:

> "You are instructed that the defendant has set up as a defense to the commission of the crime charged, the fact that the officers who made the arrest were guilty of entrapment.

"The theory of the defense is based on Webster's definition of the verb "To Entrap," which is contained in these words 'to ensnare,' 'to entangle or take captive by trick or artifice; to take or catch in a trap as to entrap a bird.'

"You are instructed that as a matter of law, if you believe from the evidence that the defendant was entrapped into committing a crime which he would not have committed had there been no intrigue on the part of the officers, then and in that event you should find the defendant not guilty.

"The defendant has been charged with selling intoxicating liquor, to-wit: whiskey, contrary to the provisions of the Volstead Act. The defendant claims that he was entrapped into selling one bottle of whiskey through the instructions of prohibition agents, and that the whiskey would not have been sold at all if it had not been for the importunities and solicitations made by the officers and agents who went to La Grande in order to prosecute violators of the Federal Prohibition Law; and in this connection I charge you that if you be-

lieve from the evidence that the defendant was induced by the importunities of the prohibition agents to violate the law, and that through the instigation of either..... or ..... or both of them, representing prohibition enforcement officers, the defendant, Erza Allen, was induced to sell them intoxicating liquors, and that he would otherwise not have violated the law, then you should return a verdict of not guilty, as it is the policy of the United States Courts not to uphold a conviction in any case where the offense was committed through the instigation of Government agents.

"If you find from the evidence that the officers accompanied by the defendant went to the place where it is claimed the liquor was sold, and thereafter importuned the defendant to sell them some intoxicating liquor, and induced him to sell such liquor, and that yielding to the importunities the defendant did procure for said officers, the intoxicating liquor testified to by the said officers, and you further believe that the defendant, without such solicitation and importunities, would not

have violated the law, then it is your duty to find the defendant not guilty for the reason heretofore stated, that the Federal Courts do not uphold conviction for offenses committed through instigation of Government agents.

"You are the sole and exclusive judges of the facts in this case, and whether or not there was an entrapment as claimed by the defendant, is a question of fact for you to determine. If he was entrapped, as before pointed out, then the law is that a verdict of not guilty should be returned."

It is further alleged by the defendant that the Court erred in refusing to give a requested instruction relating to agency, which instruction is as follows:

"Where one person procures or buys intoxicating liquor for another or assists him to buy or procure such liquor, he is not guilty of making a sale of such liquor, notwithstanding both the money and the liquor passed through his hands, provided he has no interest in the liquor or in the price and acts as the agent or intermediary of the buyer and not of the seller."

POINTS AND AUTHORITIES.

Requested instructions may be properly refused if there are no facts in the case to justify such instructions.

Coffin vs. United States, 162 U. S. 664, 672.
Condello vs. United States, 297 Fed. 200.

There is no evidence of entrapment where the testimony on the part of the Government simply tends to show sales of liquor and this testimony is controverted by the defense.

Johnston vs. United States, 1 F (2d) 928.
Bakotich vs. United States, CCA 9th Circuit (Not Yet Reported).

If intent and purpose to violate the law are present, the mere fact that public officers furnish the opportunity is no defense.

Ritter vs. United States, 293 Fed. 187, 189.
Billingsley vs. United States, 274 Fed. 86.
Farley vs. United States, 269 Fed. 721.

The refusal by the trial court to charge sound law requested by accused does not always constitute reversible error, since even in a criminal case error requiring reversal must be substantial and prejudice will not be presumed, if it is impossible to see that

the error could have wronged the party who complains of it or if accused is plainly guilty.

Tobias vs. United States, 2 F (2d) 361.
Simmons vs. United States, 300 Fed. 321.
Hobart vs. United States, 269 Fed. 784.
Kalmanson vs. United States, 287 Fed. 71.

One who tells a buyer he will obtain whiskey for him and who then purchases whiskey from seller with money given him by the buyer is guilty of selling whiskey in violation of the National Prohibition Act, since he acts as seller's agent, without whose aid and assistance the seller could not have made the sale.

Wigington vs. United States, 296 Fed. 125.

ARGUMENT.

The testimony on behalf of the Government shows that the defendant sold two pint bottles of whiskey to George Pierce on two different occasions on September 1, 1924. George Pierce was commissioned a Federal Prohibiton Agent on September 10, 1924, and at the time of the sale was expecting the arrival of said commission. The testimony further shows that Federal Prohibition Agent T. B. Buffington and George Pierce went to La Grande at the request of the police department and were informed by them

that the prohibition law was being violated at the Imperial Pool Hall or Billiard Parlor at La Grande. Accordingly Buffington equipped Pierce with marked money and instructed him to investigate the Imperial Pool Hall and ascertain who was violating the law at that place. Pierce went to the Imperial Pool Hall about 10:30 in the morning of September 1st and met Mark Patton an acquaintance in front of said pool hall. Pierce asked Patton where he could purchase liquor and was introduced to the defendant, Ezra Allen. Pierce then asked the defendant to sell him a bottle of whiskey and defendant agreed. Pierce went to the lavatory in the back of the Imperial Pool Hall; defendant followed a minute or so later, gave Pierce a pint bottle of whiskey and was paid $3.50 in marked money by Pierce. Pierce then left the pool hall, but could not locate Agent Buffington for some little time and it was then decided that another purchase should be made from the defendant. Buffington again gave Pierce $3.50 in marked money and in the afternoon of the same day, Pierce met defendant at the Imperial Pool Hall and again asked him for whiskey. Defendant asked him how many bottles he wanted and Pierce told him one. Defendant told Pierce to go to the back end of the pool hall and wait and that he, defendant,

would come back there. Pierce waited some fifteen or twenty minutes and defendant did not appear. Pierce then went to the front part of the pool hall where defendant was standing and the sale was made. Defendant pulled a pint bottle of moonshine whiskey out of his shirt, handed it to Pierce and Pierce gave him $3.50 in marked money for the bottle.

Defendant was then arrested and an additional pint bottle of whiskey taken from his possession. He was searched and 50c of the marked money which Pierce paid for the first bottle, and the $3.50 paid for the second bottle, were recovered from him.

The defendant denied selling Pierce the bottle of whiskey on the morning of September 1st; he admitted handing Pierce the bottle of whiskey in the afternoon and admitted receiving the $3.50 from Pierce, but nevertheless denied that he sold said bottle.

There is certainly no entrapment shown by the testimony adduced on behalf of the Government, either as to the sale of the first bottle or as to the second bottle. This testimony merely establishes the sale of intoxicating liquor. Defend-

ant denied the sale of the first bottle and no issue of entrapment could be raised by such denial as the only question was whether or not the bottle of whiskey had been sold by defendant to Pierce. There are, therefore, no facts relating to the sale of the first bottle to justify an instruction on the defense of entrapment.

The defendant's testimony in regard to the sale of the second bottle of whiskey to Pierce, so far as it might relate to entrapment is as follows:

"Q. Now, did he ask you to get him a bottle of whiskey?

A. Yes, sir.

Q. State the circumstances surrounding that.

A. He just kept after me, kept after me to go get a bottle; just kept it up all the time. 'Go get me a bottle, Go get me a bottle. I have a couple of women up in a room; they have got to have a drink.' I says, 'I haven't got nothing like that.' He says, 'Can't you get it?' I says, 'If there is anybody comes arond selling it, possibly I will see about it for you.' He came back three or four different times, kept on for me to get him a bottle. Finally I told him, 'If there is any one shows up that has one for you, I will get it for you.' Presently a fellow came in. He

says, 'Yes.' He had already given me $3.50. He came back there, give me the bottle. I handed it to Pierce.

Q. Did he give you the money before or after you gave him the whiskey?

A. He gave me the money before—a long time before then.

Q. How long?

A. Possibly half an hour.

Q. You procured the whiskey for him?

A. This boy handed it to me. I handed it right over to him—just the transaction, handed it to him."

The testimony shows that when Pierce first asked defendant to get him a bottle, defendant agree to "see about it" for him, and was willing to furnish him whiskey. Pierce did not induce, entice or trick the defendant into selling him this bottle of whiskey and apparently no persuasion was necessary. Certainly on this testimony it can not be said that the defendant would not have sold liquor if it had not been for the offer made by Mr. Pierce. It is quite apparent that defendant would have consented to "see about it" for any person whom he might deem it safe to deal with. Any person approaching the defendant and asking for a bottle of whiskey as Mr.

Pierce did in this case, would have been furnished with whiskey in the same manner that Pierce was. No entrapment is shown by this testimony, nor is there any entrapment shown by the testimony of the Government's witnesses.

It is further apparent from the defendant's testimony that he based his defense upon the theory that he did not sell the liquor to Pierce, hence he was not entitled to any instructions on entrapment.

In the case of Bakotich vs. United States, supra, Judge Hunt, speaking for the Circuit Court of Appeals, said:

> "If the testimony of the prosecution was accepted, as it was, what the officer did was merely to give defendant who was then under suspicion, an opportunity to make a sale of liquor—an opportunity, so the jury have found, availed of by defendant. Defendant offered no evidence of entrapment into making a sale. He denied that a sale was made and founded his defense upon the position that he made a gift to the man because he believed he was ill.
>
> "The real question, therefore, was whether

there was a sale or a gift. Upon that point the Court very clearly instructed that the burden of proving a sale was upon the government. 'Of course,' said the Court, 'the government having alleged a sale, must prove a sale, and if the defendant gave the liquor to McGhee without a consideration the count is not proven; but the question here is for you to determine as between these two men which one is telling the truth. Is McGhee telling the truth when he says he paid fifty cents for the liquor, or is the defendant telling the truth when he says he gave the liquor to McGhee?' We can not see how defendant was prejudiced by the refusal of the Court to give the instructions requested."

Assuming for the purposes of argument that there was an issue of entrapment in regard to the sale of the second bottle of whiskey which should have gone to the jury, the refusal of the court to instruct the jury is not reversible error. The defendant was found guilty by the jury of selling whiskey on September 1st. Three bottles of whiskey were introduced in evidence; the first, accord-

ing to the Government's testimony, was sold by defendant to Pierce in the morning of September 1st; the second sold by defendant to Pierce on the afternoon of the same day; and the third taken from defendant's possession at the time of his arrest. Defendant denied the sale of the first bottle and the possession of the third bottle. The issue raised thereby was whether or not defendant sold the first bottle to Pierce and whether or not he possessed the third bottle. On the question as to what constitutes a sale the Court instructed the jury as follows:

> "The second count in the information is simply, that the defendant sold this liquor; and a sale is simlpy a transfer, for a consideration, by one person to another, of the title of the property. And title of personal property is usually passed by passing the property itself from one to another—the possession. That is the sole question to be determined by you on the second count in the information, to-wit: whether or not the defendant in this case did sell one or two of these bottles of liquor that have been introduced in evidence, to the prohibition officer or to Mr. Pierce, who testified in the case before you, and whether

> he then delivered the property over to Mr. Pierce, and whether he took from Mr. Pierce a consideration therefor. If he did—if all these things have been proven—then the second count in the information would have been established."

This instruction correctly states the law and puts the issues involved in the sale of the first bottle squarely before the jury. The verdict and judgment are, therefore, upheld by the evidence relating to the sale of the first bottle of whiskey to Pierce and the instructions of the Court which properly placed the issues involved before the Jury. The second bottle of whiskey and the evidence relating to its sale to Pierce can be disregarded or taken out of the case entirely and the defendant would not be prejudiced thereby. Certainly this Court will not say as a matter of fact, that the jury found the defendant guilty of selling the second bottle of whiskey to Pierce and not guilty of selling the first bottle. If there was any error committed by the Court in failing to instruct in any matter connected with the sale of the second bottle, such error would not prejudice the defendant and prejudice will not be presumed even in a criminal case, if it is impossible

to see that the error could have injured the party who complains of it.

Again assuming that there was evidence of entrapment in the sale of the second bottle, the instructions requested by the defendant on entrapment are too broad as they relate to the sale of both bottles. Furthermore it is apparent that if the defendant did sell the bottle of whiskey to Pierce in the morning of September 1st, then there would be no entrapment as to a second sale on the same day. Fisk vs. United States, 279 Fed. 12, 15. Defendant's requested instructions did not take this into consideration.

The instruction requested by defendant relating to agency, is not sound law as it is apparent that any one who aids and assists a seller of intoxicating liquor is equally guilty with the seller. This comes within the rule laid down in the case of Wigington vs. United States, supra, and the facts in that case are very similar to the testimony given by defendant in this case. The Court in that case held that a person who purchases whiskey from the seller, with money given him by the buyer, is guilty of selling whiskey since he acts as seller's agent without whose aid and assistance the seller could not

have made the sale.

This requested instruction is based on the theory that the defendant did not sell liquor to Pierce. The Court fully instructed the Jury as to what constituted a sale and the defendant in any event is not prejudiced by the Court's failing to give the instruction requested. This requested instruction is inconsistent in theory with the requested instructions on entrapment and defendant should not now be heard to complain because the Court did not follow the theory of both instructions.

Respectfully submitted.

GEORGE NEUNER,
United States Attorney for the
District of Oregon.

FORREST E. LITTLEFIELD,
Assistant United States Attorney for
the District of Oregon.

No. 4486

United States

Circuit Court of Appeals

For the Ninth Circuit.

CRYSTAL COPPER COMPANY, a Corporation,
Plaintiff in Error,

vs.

PETE GAIDO and BATT TAMIETTI,
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4486

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

H. A. TYVAND, Butte, Montana,
F. E. McCRACKEN, Butte, Montana,
Attorneys for Plaintiffs and Defendants in Error.

Messrs. WALKER and WALKER, Butte, Montana,
C. S. WAGNER, Butte, Montana,
Attorneys for Defendant and Plaintiff in Error.

In the District Court of the United States in and for the District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLEERO, and FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,

Defendant.

BE IT REMEMBERED, that on the 28th day of November, 1923, an amended complaint was filed herein, which said amended complaint is in the words and figures as follows, to wit: [1*]

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*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, in and for the District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLEERO, and FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,

Defendant.

AMENDED COMPLAINT.

Come now the plaintiffs above named, by leave of Court first had and obtained, make, enter and file this their amended complaint, and for cause of action, complain of the defendant and allege:

1.

That the defendant, Crystal Copper Company, is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Maine, with full power and authority to engage in mining and leasing and subleasing mining property and its mining property, and engaged in mining ores in the County of Silver Bow, State of Montana, and subleasing certain portions of the Goldsmith Mine, as hereinafter mentioned; that the said defendant is and at all of the times herein mentioned was a citizen and resident of the State of Maine; that said defendant at all of said times had and now has a certified copy of its

Articles of Incorporation filed in each of the following offices, to wit: Secretary of State of Montana and County Clerk and Recorder of Silver Bow County, State of Montana; and that Matt W. Alderson was at all the times herein mentioned the duly appointed, qualified and acting process agent for said defendant; and that Batt Tamietti and Lawrence Monzetti, plaintiffs are, and at all of said times [2] herein mentioned were citizens and residents of the State of Montana; that plaintiffs, Pete Gaido, John Pagleero and Frank Tamietti are, and at all times herein mentioned were, subjects of the Kingdom of Italy and residents of the State of Montana.

2.

That there is, and at all times herein mentioned was, a quartz mine known as the Goldsmith Mine located north of Butte, in the County of Silver Bow, State of Montana; that said mine extends in an easterly and westerly direction of about 1500 feet and in a northerly and southerly direction of about 600 feet, and that in said Goldsmith Mine there is, and at all the times herein mentioned was a level known and designated as the 500 foot level; and that in said Goldsmith Mine there is, and at all of said times was a shaft commonly known and designated as No. 1 shaft, and is, and at all of the times herein mentioned was, the only shaft in said mine used to hoist and lower men working in said mine, to lower timber, hoist ore and lower other supplies used in connection with the operation of said mine; that said shaft at all of the times herein mentioned

was in the possession of and under the charge and control of said defendant; that in said mine there is, and at all of the times herein mentioned was, a lead at and below said 500 foot level running in an easterly and westerly direction, commonly known and designated as the North Lead in said mine; that in said North Lead about 1000 feet in a northwesterly direction from said No. 1 Shaft there was on or about the 26th day of June, 1921, a certain winze about 35 feet deep from and under the 500 foot level of said mine.

3.

That the defendant, Crystal Copper Company, is, and at all times herein mentioned was, engaged in mining ores at the said Goldsmith Mine under a certain lease with the owners of the Goldsmith Mine in the County of Silver Bow, [3] State of Montana, and had full power and authority under said lease to sublease and grant to miners all the ores in any part or portion of said mine with the right in said miners to the exclusive possession and exclusive right to work such parts or portions of said mine, as they were granted by said defendant.

4.

That one Matt W. Alderson is, and at all times herein mentioned was the general manager and superintendent of the defendant, Crystal Copper Company, with full power, authority, charge, control, superint*ed*ency and management of said mine for said company, and with full power and authority from said company to sublease and grant to miners all the ores in any part or portion of said mine with

the right in such miners to the exclusive possession and exclusive right to work such parts or portions of said mine, as they were granted by said defendant.

5.

That the plaintiffs, Lawrence Monzetti, Pete Gaido, Batt Tamietti, John Pagleero and Frank Tamietti, are, and at all times herein mentioned were mining copartners in mine subleasing from said defendant.

6.

That on or about the 26th day of June, 1921, the above-named plaintiffs as aforesaid entered into an oral lease with the defendant for a certain portion of said Goldsmith Mine, to wit: 50 feet downward in said winze along the said North Lead from and under the 500 foot level of said mine approximately 1000 feet in a northwesterly direction from said No. 1 shaft, and easterly along the said lead to the east boundary line of said mine, and westerly to the west boundary line of said mine.

7.

That the terms and conditions of said sublease were, and are as follows, to wit: The plaintiffs were to enter in [4] and upon said property and commence work, and to continue to work in said winze and sink the said winze to a depth of about 50 feet and search for marketable ores; that in consideration of the work to be performed by the said plaintiffs, the said defendant granted the said plaintiffs the exclusive right of possession of said winze and any drifts, cross-cuts and stopes from said winze the

said plaintiffs would make in the above-described portion of said mine, and granted the said plaintiffs all the commercial ores they would discover in said winze to the depth of 50 feet and all commercial ore discovered in any and all drifts, cross-cuts and stopes from said winze to the depth of 50 feet within the boundary lines of said mine and up to the 500 foot level of said mine, with the exclusive right to mine and remove any and all ores discovered by the said plaintiffs from said winze and any drifts, cross-cuts, and stopes the said plaintiffs would make, in the above-described portion of said mine, and the said defendant was to furnish all explosives, all tools and timber needed, without charge to the plaintiffs outside of the royalties hereinafter mentioned, and to hoist and lower plaintiffs and their servants whenever necessary and to hoist all waste and ore which the plaintiffs delivered to the shaft on said 500 foot level in said mine in full carloads from said winze, drifts, cross-cuts and stopes without charge to plaintiffs outside of the royalties hereinafter mentioned; that on all ores shipped by the said lessees under said sublease the following deductions were to be made, to wit, freight charges on all the ores shipped to the smelter, and on all ores assaying up to $25.00 per ton, 11½% royalty; from $25.00 to $50.00 per ton 23% royalty; from $50.00 to $100.00 per ton 34½% royalty; from $100.00 to $200.00 per ton 46% royalty; from $200.00 and up per ton 57½% royalty to the owners of the Goldsmith Mine, [5] and 50% of the net balance was to go to the plaintiffs and 50% to defendant.

8.

That plaintiffs, Lawrence Monzetti, Pete Gaido, Batt Tamietti and John Pagleero, duly entered in and upon said mine on or about the 26th day of June, 1921, commenced sinking the said winze and continued to sink the said winze upon the terms and conditions aforesaid, pumping all water, doing all work that was necessary, including timbering and mining, until they had sunk said winze to a depth of about 50 feet.

9.

That the said defendant then and there on or about the 20th day of July, 1921, and after plaintiffs had discovered a vein of commercial ore in said lead running in an easterly and westerly course, orally agreed with the said plaintiffs to grant, and did grant, an extension of territory to the said plaintiffs to be mined by them in consideration that the said plaintiffs sink the said winze to a deeper depth, and that said plaintiffs were to have the exclusive right to all ores they discovered between the bottom of the said winze, when sunk to a deeper depth, up to the 500 foot level and within the boundary lines of said mine upon the same terms, conditions and royalties as aforesaid, and exclusive possession of said portion of said mine.

10.

That at all times hereinbefore mentioned, plaintiff, Frank Tamietti, had been sick and ill and unable to work in or upon said lease, all of which the said defendant had had notice of and had consented to the absence of the said plaintiff, Frank Tamietti;

that on or about the 20th day of July, 1921, after having recovered from said illness, with the consent of the defendant the said plaintiff, Frank Tamietti, commenced working in and upon said lease with plaintiffs, Lawrence Monzetti, Pete Gaido, Batt Tamietti, and John Pagleero as [6] copartner with said plaintiffs.

11.

That the said plaintiffs pursuant to the aforesaid sublease and extension thereto; then and there on or about the 20th day of July, 1921, commenced sinking the said winze to a deeper depth than 50 feet, until they had reached the depth of about 75 feet and had struck a fault in said lead; that the said plaintiffs and lessees sank a sump in said winze about 6 feet deep and then commenced drifting east and west from said winze upon said vein of ore in said lead, and drifted for a distance of about 100 feet east, until they had come to a point where the ore in said vein ceased to be commercial in value; that the said plaintiffs and lessees then returned to the winze and commenced stopeing and breaking ore and stoped up about 20 feet from the bottom of said winze and about 20 feet east from said winze; that then and there at the request of said defendant and under an oral agreement with the said defendant, the said plaintiffs were granted an extension of said lease by said defendant, wherein and whereby the said plaintiffs and lessees were to have, in addition to the territory already granted them, the exclusive right to mine all ores they would discover by cross-cutting north into the footwall of said lead, between the

boundary lines of said mine and the bottom of said winze and the 500 foot level of said mine, and exclusive possession of the same upon the aforesaid terms, conditions and royalties; that said plaintiffs commenced cross-cutting from the bottom of said drift north into the footwall of said lead and cross-cutted about 15 feet into another vein in said lead and struck rich and valuable ore which assayed and assays on the average of about 37 ounces of silver per [7] ton and about $7.00 in gold per ton; that the ore in the first vein mentioned herein assayed and assays on the average of about 70 ounces of silver per ton and about $11.00 in gold per ton; that the vein in the footwall of said lead is on the average of about 3 feet wide and that the vein in the hanging-wall of said lead is on the average of about 3 feet wide.

12.

That in accordance with the above terms, conditions, and royalties said plaintiffs and lessees shipped 10 cars of ore from said lease to the smelter on and between the 10th day of August, 1921, and the 3d day of March, 1922; that on or about the 31st day of December, 1921, the plaintiffs and defendant had made full settlement on the first eight cars of ore shipped to the smelter and that defendant thereby ratified the terms and conditions of said sublease and extensions thereof; that on or about the 31st day of January, 1922, the defendant received smelter returns and settlement from the smelter upon the ninth car that was shipped to the smelter by plaintiffs from said lease, and that on or

about the 3d day of March, 1922, the defendant received smelter returns and settlement from smelter on the 10th car that was shipped by plaintiffs from said lease; that $122.86 on the said last two cars of ore shipped by plaintiffs from said lease to the smelter was withheld by defendant from said plaintiffs, that $100.00 of said sum was withheld to pay for 400 shares of stock in the defendant corporation, that plaintiffs had heretofore purchased from defendant; that defendant failed, neglected and refused and ever since the 3d day of March, 1922, has failed, neglected and refused to deliver to plaintiffs the said 400 shares of stock heretofore paid for, and that there is a balance of Twenty-two and 86/100 ($22.86) Dollars due, owing and unpaid the plaintiffs by the said defendant [8] upon said ninth and tenth cars of ore shipped by plaintiffs to the smelter from said lease.

13.

That the plaintiffs, Lawrence Monzetti, Pete Gaido, Batt Tamietti and John Pagleero worked continuously under the said sublease and the said extension thereto from the 26th day of June, 1921, until the 16th day of January, 1922, and that plaintiff, Frank Tamietti, worked continuously under the said sublease and the said extensions thereto from on or about the 20th day of July, 1921, until the 16th day of January, 1922; that the defendant then and there on or about the 16th day of January, 1922, arbitrarily ejected the plaintiffs, Lawrence Monzetti, Pete Gaido and Batt Tamietti, without cause, from said property, and arbitrarily refused to per-

mit the plaintiffs to go on with the said sublease, without cause, or to enter in or upon the said property, and arbitrarily cancelled and rescinded the said sublease of plaintiffs, without cause; that plaintiffs were at all times herein mentioned, able, ready and willing to go on with the said sublease, had they been permitted to do so by defendant.

14.

That there were about 1000 tons of ore averaging 70 ounces of silver per ton and $11.00 in gold per ton or of the value of $81.00 per ton in the vein of ore on the hanging-wall side of said lead, between the bottom of said winze and the 500 foot level of said mine, and the east and west line of said mine yet to be mined on said date, January 16, 1922, that could and would have been mined by said plaintiffs and lessees within 30 days from and after the said sixteenth day of January, 1922, if the said defendant had not interfered with the said plaintiffs [9] and lessees, and arbitrarily cancelled and rescinded the said sublease, without cause, that the said plaintiffs and lessees were and are entitled to under said sublease to mine and ship to the smelter under the terms, conditions and royalties of the aforesaid sublease, and that these plaintiffs would have realized on said ore a net profit to themselves of Sixteen and 67/100 ($16.67) Dollars per ton; and that there were approximately one thousand (1000) tons of ore to be mined in the footwall of said lead between the bottom of said winze and the 500 foot level of said mine, and the east and west lines of said mine, which could and would have been mined by said plaintiffs

and lessees within a period of ninety days from and after the 16th day of January, 1922, if the said defendant had not interfered with said lessees and arbitrarily cancelled and rescinded the said sublease, without cause as aforesaid; that said plaintiffs and lessees were and are entitled under said sublease to mine and ship to the smelter under the terms, conditions and royalties of the aforesaid sublease, which would have averaged about 37 ounces of silver per ton and about $7.00 in gold per ton or of the value of $42.00 per ton for said ore, which said lessees could have mined at a net profit of Twelve and 50/100 ($12.50) Dollars per ton to said plaintiffs under the terms and conditions of said sublease.

15.

That by reason of the said arbitrary cancellation and rescission of said sublease, without cause, and the arbitrary ejectment of the said plaintiffs, Lawrence Monzetti, Pete Gaido and Batt Tamietti, from said property by the defendant, without cause, as aforesaid, and the arbitrary refusal of the defendant to permit the plaintiffs to go on with said sublease and enter in and upon the said property as aforesaid, without cause, the plaintiffs have been damaged in the sum of Twenty-two Thousand One Hundred Sixty-six and 67/100 ($22,166.67) Dollars, no part of [10] which has been paid; that the cancellation of said sublease and the ejectment of the said plaintiffs, Lawrence Monzetti, Pete Gaido and Batt Tamietti, from said property and the refusal as aforesaid of said defendant to permit plaintiffs to go on with

the said sublease was arbitrary on the part of the defendant, and without cause.

WHEREFORE, plaintiffs pray judgment against the defendant upon this first cause of action for the sum of Twenty-two Thousand One Hundred Sixty-six and 67/100 ($22,166.67) Dollars damages, together with costs of suit and for such other and further relief as to the Court may seem meet and just.

SECOND CAUSE OF ACTION.

For a second cause of action the plaintiffs complain of the defendant and for cause of action allege:

1.

That the defendant, Crystal Copper Company, is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Maine, with full power and authority to engage in mining, and leasing, subleasing mining property and its mining property, and engaged in mining ores in the County of Silver Bow, State of Montana, and subleasing certain portions of the Goldsmith Mine, as hereinafter mentioned; that the said defendant is and at all of the times herein mentioned was a citizen and resident of the State of Maine; that said defendant at all of said times had and now has a certified copy of its Articles of Incorporation filed in each of the following offices, to wit: Secretary of State of Montana and County Clerk and Recorder of Silver Bow County, State of Montana; and that Matt W. Alderson was at all the times herein mentioned the duly

appointed, qualified and acting process agent for said [11] defendant; and that Batt Tamietti and Lawrence Monzetti, plaintiffs, are, and at all of said times herein mentioned were citizens and residents of the State of Montana; that plaintiffs, Pete Gaido, John Pagleero and Frank Tamietti are, and at all times herein mentioned were, subjects of the Kingdom of *Itaho* and residents of the State of Montana.

2.

That there is and at all times herein mentioned was a quartz mine known as the Goldsmith Mine located north of Butte, in the county of Silver Bow, State of Montana; that said mine extends in an easterly and westerly direction of about 1500 feet and in a northerly and southerly direction of about 600 feet, and that in said Goldsmith Mine there is, and at all of the times herein mentioned was a level known and designated as the 500 foot level; and that in said Goldsmith Mine there is, and at all of said times was a shaft commonly known and designated as No. 1 shaft, and is, and at all of the times herein mentioned was the only shaft in said mine used to hoist and lower men working in said mine, to lower timber, hoist ore and lower other supplies used in connection with the operation of said mine; that said shaft at all of the times herein mentioned was in the possession of and under the charge and control of said defendant; that in said mine there is, and at all of the times herein mentioned was a lead at and below said 500 foot level running in an easterly and westerly direction, commonly known and designated as the North Lead

in said mine; that in said North Lead about 1000 feet in a northwesterly direction from said No. 1 shaft there was on or about the 26th day of June, 1921, a certain winze about 35 feet deep from and under the 500 foot level of said mine.

3.

That the defendant, Crystal Copper Company is, and at all times herein mentioned was engaged in mining ores at the said Goldsmith Mine under a certain lease with the owners [12] of the Goldsmith Mine in the county of Silver Bow, State of Montana, and had full power and authority under said lease to sublease and grant to miners all the ores in any part or portion of said mine with the right in said miners to the exclusive possession and exclusive right to work such parts or portions of said mine, as they were granted by said defendant.

4.

That one Matt W. Alderson is, and at all times herein mentioned was the general manager and superintendent of the defendant, Crystal Copper Company with full power, authority, charge, control, superintendency and management of said mine for said company, and with full power and authority from said company to sublease and grant to miners all the ores in any part or portion of said mine with the right in such miners to the exclusive possession and exclusive right to work such parts or portions of said mine, as they were granted by said defendant.

5.

That the plaintiffs, Lawrence Monzetti, Pete Gaido, Batt Tamietti, John Pagleero and Frank Tamietti are, and at all times herein mentioned were mining copartners in mine subleasing from said defendant.

6.

That on or about the 26th day of June, 1921, the above-named plaintiffs as aforesaid entered into an oral lease with the defendant for a certain portion of said Goldsmith Mine, to wit: 50 feet downward in said winze along the said North Lead from and under the 500 foot level of said mine approximately 1000 feet in a northwesterly direction from said No. 1 shaft, and easterly along the said lead to the east boundry line of said mine, and westerly to the west boundry line of said mine. [13]

7.

That the terms and conditions of said sublease were and are as follows, to wit: The plaintiffs were to enter in and upon said property and commence work and to continue to work in said winze and sink the said winze to a depth of about 50 feet and search for marketable ores; that in consideration of the work to be performed by the said plaintiffs the said defendant granted the said plaintiffs the exclusive right of possession of said winze and any drifts, cross-cuts and stopes from said winze the said plaintiffs would make in the above-described portion of said mine, and granted the said plaintiffs all the commercial ores they would discover in said winze to the depth of 50 feet and all

commercial ore discovered in any and all drifts, cross-cuts and stopes from said winze to the depth of 50 feet within the boundry lines of said mine and up to the 500 foot level of said mine, with the exclusive right to mine and remove any and all ores discovered by the said plaintiffs from said winze and any drifts, cross-cuts and stopes the said plaintiffs would make, in the above-described portion of said mine, and the said defendant was to furnish all explosives, all tools and timber needed, without charge to the plaintiffs outside of the royalties hereinafter mentioned, and to hoist and lower plaintiffs and their servants whenever necessary and to hoist all waste and ore which the plaintiffs delivered to the shaft on said 500 foot level in said mine in full carloads from said winze, drifts, cross-cuts and stopes without charge to plaintiffs outside of the royalties hereinafter mentioned; that on all ores shipped by the said lessees under said sublease the following deductions were to be made, to wit, freight charges on all the ores shipped to the smelter, and on all ores assaying up to $25.00 per ton, 11½% royalty; from $25.00 to $50.00 per ton, 23% royalty; from $50.00 to $100.00 per ton, 34½% royalty; [14] from $100.00 to $200.00 per ton, 46% royalty; from $200.00 and up per ton, 57½% royalty to the owners of the Goldsmith Mine, and 50% of the net balance was to go to the plaintiffs and 50% to defendant.

8.

That plaintiffs, Lawrence Monzetti, Pete Gaido, Batt Tamietti and John Pagleero, duly entered in

and upon said mine on or about the 26th day of June, 1921, commenced sinking the said winze and continued to sink the said winze upon the terms and conditions aforesaid, pumping all water, doing all work that was necessary, including timbering and mining, until they had sunk said winze to a depth of about 50 feet.

9.

That the said defendant then and there on or about the 20th day of July, 1921, and after plaintiffs had discovered a vein of commercial ore in said lead running in an easterly and westerly course, orally agreed with the said plaintiffs to grant, and did grant, an extension of territory to the said plaintiffs to be mined by them in consideration that the said plaintiffs sink the said winze to a deeper depth, and they, said plaintiffs, were to have the exclusive right to all ores they discovered between the bottom of the said winze, when sunk to a deeper depth, up to the 500 foot level and within the boundary lines of said mine upon the same terms, conditions and royalties as aforesaid, and exclusive possession of said portion of said mine.

10.

That at all times hereinbefore mentioned, plaintiff, Frank Tamietti, had been sick and ill and unable to work in or upon said lease, all of which the said defendant had had notice of and had consented to the absence of the said plaintiff, Frank Tamietti; that on or about the 20th day of July, 1921, [15] after having recovered from said ill-

ness, with the consent of the defendant the said plaintiff, Frank Tamietti, commenced working in and upon said lease with plaintiffs, Lawrence Monzetti, Pete Gaido, Batt Tamietti and John Pagleero, as copartners with said plaintiffs.

11.

That the said plaintiffs pursuant to the aforesaid sublease and extension thereto, then and there on or about the 20th day of July, 1921, commenced sinking the said winze to a deeper depth than 50 feet, until they had reached the depth of about 75 feet and had struck a fault in said lead; that the said plaintiffs and lessees sank a sump in said winze about 6 feet deep and then commenced drifting east and west from said winze upon said vein of ore in said lead, and drifted for a distance of about 100 feet east, until they had come to a point where the ore in said vein ceased to be commercial in value; that the said plaintiffs and lessees then returned to the winze and commenced stopeing and breaking ore and stoped up about 20 feet from the bottom of said winze and about 20 feet east from said winze; that then and there at the request of said defendant and under an oral agreement with the said defendant, the said plaintiffs were granted an extension of said lease by said defendant, wherein and whereby the said plaintiffs and lessees were to have, in addition to the territory already granted them, the exclusive right to mine all ores they would discover by cross-cutting north into the footwall of said lead, between the boundary lines of said mine and the bottom of said winze

and the 500 foot level of said mine, and exclusive possession of the same upon the aforesaid terms, conditions and royalties; that said plaintiffs commenced cross-cutting from the bottom of said drift north into the footwall of said lead and cross-cutted about 15 feet [16] into another vein in said lead and struck rich and valuable ore which assayed and assays on the average of about 37 ounces of silver per ton and about $7.00 in gold per ton; that the ore in the first vein mentioned herein assayed and assays on the average of about 70 ounces of silver per ton and about $11.00 in gold per ton; that the vein in the footwall of said lead is on the average of about 3 feet wide, and that the vein in the hanging-wall of said lead is on the average of about 3 feet wide.

12.

That in accordance with the above terms, conditions and royalties, said plaintiffs and lessees shipped 10 cars of ore from said lease to the smelter on and between the 10th day of August, 1921, and the 3d day of March, 1922; that on or about the 31st day of December, 1921, the plaintiffs and defendant had made full settlement on the first eight cars of ore shipped to the smelter, and that defendant thereby ratified the terms and conditions of said sublease and extensions thereof; that on or about the 31st day of January, 1922, the defendant received smelter returns and settlement from the smelter upon the ninth car that was shipped to the smelter by plaintiffs from said lease, and that on or about the 3d day of March, 1922, the defendant

received smelter returns and settlement from smelter on the 10th car that was shipped by plaintiffs from said lease; that $122.86 on the said last two cars of ore shipped by plaintiffs from said lease to the smelter was withheld by defendant from said plaintiffs, that $100.00 of said sum was withheld to pay for 400 shares of stock in the defendant corporation, that plaintiffs had heretofore purchased from defendant; that defendant failed, neglected and refused and ever since the 3d day of March, 1922, has failed, neglected and refused to deliver to [17] plaintiffs the said 400 shares of stock heretofore paid for, and that there is a balance of twenty-two and 86/100 ($22.86) dollars due, owing and unpaid the plaintiffs by the said defendant upon said ninth and tenth cars of ore shipped by plaintiffs to the smelter from said lease.

13.

That on or about the 19th day of October, 1921, while the said plaintiffs were working in and upon the said lease, the said plaintiffs entered into a contract with the defendant, at the said defendant's special instance and request, to purchase 5,000 shares of stock in the defendant corporation from the said defendant at the agreed price of 25¢ per share net, and that the said stock was to be paid for by said plaintiffs as follows, to wit: $25.00 was to be taken from the net returns of each of said plaintiffs share on each and every railroad car, of about 50 tons each, shipped by the said plaintiffs from said lease and sold to the smelter on and after said date.

14.

That thereafter the said plaintiffs shipped a railroad car of about 50 tons on the 27th day of October, 1921, and $25.00 from each of said lessees was deducted from their share in the returns of each railroad car of ore so shipped, and the said money deducted was credited upon the said 5,000 shares of stock, and that $25.00 from each of said plaintiffs was deducted from each and every railroad car thereafter shipped by said plaintiffs and sold to the smelter.

15.

That on or about the 3d day of January, 1922, the said plaintiffs had paid for 2,500 shares of stock by the deductions made on each railroad car so shipped as aforesaid, [18] and that the said defendant delivered 500 shares of stock to each of the said plaintiffs or 2,500 shares of stock, and thereby ratified said agreement to sell stock to said plaintiffs as aforesaid.

16.

That thereafter on or about the 31st day of January, 1922, the sixth railroad car of ore of about 50 tons, after entering into said contract to purchase stock was loaded by the said plaintiffs and shipped to the smelter and sold, and that $25.00 was deducted from the net returns of each of said plaintiffs to pay on said contract for said stock.

17.

That thereafter on or about the 3d day of March, 1922, the said plaintiffs shipped the seventh railroad carload of ore, after entering into said con-

tract to purchase stock, from said lease of about 25 tons to the smelter and sold the said ore, and that the sum of $25.00 was taken from the net returns of each of said plaintiffs on said railroad car to pay on said contract for said stock.

18.

That the plaintiffs, Lawrence Monzetti, Pete Gaido, Batt Tamietti and John Pagleero worked continuously under the said sublease and the said extension thereto from the 26th day of June, 1921, until the 16th day of January, 1922, and that plaintiff, Frank Tamietti worked continuously under the said sublease and the said extensions thereto from on or about the 20th day of July, 1921, until the 16th day of January, 1922; that the defendant then and there on or about the 16th day of January, 1922, arbitrarily ejected plaintiffs, Lawrence Monzetti, Pete Gaido and Batt Tamietti without cause, from said property, and arbitrarily refused to permit the said plaintiffs to go on with the said sublease, without cause, and arbitrarily refused to permit the said plaintiffs, Lawrence Monzetti, Pete [19] Gaido and Batt Tamietti, to enter into said mine or upon said property for the purpose of breaking ore and hoisting ore to finish their contract of paying for the stock the plaintiffs had purchased, without cause, or to enter in or upon the said property, and arbitrarily cancelled and rescinded the said sublease, without cause, and that defendant arbitrarily refused to deliver 400 shares of stock heretofore paid defendant by plaintiffs by deductions of $25.00 from each of said plaintiffs share

from each of the said last 2 railroad cars of ore shipped, without cause; and that defendant ever since the said last 2 railroad cars of ore have been shipped as aforesaid, have arbitrarily refused to deliver the said 400 shares of stock to plaintiffs heretofore paid for by plaintiffs as aforesaid, without cause.

19.

That there were about 1,000 tons of ore averaging 70 ounces of silver per ton and $11.00 per ton in gold or of the value of $81.00 per ton in the vein of ore on the hanging-wall side of said lead, between the bottom of said winze and the 500 foot level of said mine, and the east and west line of said mine yet to be mined on said date that could and would have been mined by said plaintiffs within 30 days from and after the said 16th day of January, 1922, if, the said defendant had not interfered with the said plaintiffs and arbitrarily cancelled and rescinded the said sublease, without cause, that the said plaintiffs were and are entitled to under said sublease, to mine and ship to the smelter under the terms, conditions and royalties of the aforesaid sublease, and that these plaintiffs would have realized on said ore a net profit to themselves of Sixteen and 67/100 ($16.67) Dollars per ton; and that there were approximately One Thousand (1,000) tons of ore to be mined in the footwall of said lead between the bottom of said winze and the 500 foot level of said mine and the east and west lines of said mine which could and would have been mined by said [20] plaintiffs

within a period of *ninth* days from and after the 16th day of January, 1922, if the said defendant had not interfered with said plaintiffs and arbitrarily cancelled and rescinded the said sublease, without cause, as aforesaid; that said plaintiffs were and are entitled under said sublease to mine and ship to the smelter under the terms, conditions and royalties of the aforesaid sublease, which would have averaged about 37 ounces of silver per ton and about $7.00 in gold per ton, or of the value of $42.00 per ton for said ore, which said lessees could have mined at a net profit of Twelve and 50/100 ($12.50) Dollars per ton to said plaintiffs under the terms and conditions of said sublease, and said defendant arbitrarily refused to permit plaintiffs to go on with the aforesaid contract to purchase said stock as aforesaid, without cause.

20.

That the market value of said stock is now seventy cents per share; that since the cancellation and rescission of said lease and refusal of said defendant to permit plaintiffs to mine and ship the said ore necessary to finish buying said stock the said stock has reached the market value of $2.00 per share, and that plaintiffs would have realized a net profit to themselves, if they had been permitted to mine and ship enough ore to pay for the balance of said stock, in the sum of $1.75 per share.

21.

That by reason of the cancellation and rescission of the said lease, as aforesaid, the plaintiffs have been unable to ship the balance of the ore neces-

sary to finish the said contract of purchasing the said stock, to wit, 1,300 shares of stock, [21] which they would have realized a net profit of $1.75 per share, or $2,275.00.

22.

That by reason of the arbitrary cancellation and rescission of said lease by said defendant, without cause, and the arbitrary ejectment of said plaintiffs from said property by the defendant, and the arbitrary refusal of the defendant to permit the plaintiffs to go on with said lease, and go on and complete said contract to purchase said stock or to enter in or upon the said property, without cause, and the arbitrary refusal of the said defendant to deliver the said 400 shares of stock to plaintiffs, that plaintiffs have heretofore paid for; that the plaintiffs have been damaged in the further sum of $3,075.00 upon this their second cause of action, no part of which has been paid.

WHEREFORE, plaintiffs demand judgment on this their second cause of action against the defendant for the sum of $3,075.00 as damages, together with costs of suit and for such other and further relief as to the Court may seem meet and just.

H. A. TYVAND and
F. E. McCRACKEN,
Attorneys for Plaintiffs.

(Duly verified.)

Filed November 28, 1923. C. R. Garlow, Clerk.

Thereafter, to wit, on the 18th day of August, 1924, an answer was filed herein, which said answer is in the words and figures as follows, to wit: [22]

(Title of Court and Cause.)

ANSWER.

Comes now the defendant above named and for its answer to the amended complaint of the plaintiffs on file herein, admits, denies and alleges as follows:

First Count:

I.

Admits each and every allegation of the first paragraph thereof.

II.

Admits each and every allegation of the second paragraph thereof.

III.

Admits that this answering defendant was at the times mentioned in said amended complaint, engaged in mining ores at the said Goldsmith Mine, under a certain lease with the owners of said Goldsmith Mine, in the county of Silver Bow, and State of Montana; and, except as herein admitted, denies each and every allegation of the third paragraph thereof.

IV.

Admits that Matt W. Alderson was, at the times mentioned in said amended complaint, the general manager and superintendent of this answering de-

fendant; and, save as herein above admitted, denies each and every allegation in said fourth paragraph contained.

V.

This defendant denies each and every allegation of the fifth paragraph thereof.

VI.

This defendant denies each and every allegation of the sixth paragraph thereof. [23]

VII.

This defendant denies each and every allegation of the seventh paragraph of said first count, and, in this connection, alleges:

That said pretended contract was and is void under and by virtue of the provisions of paragraphs 1 to 5 of Section 7519, Section 7593 and Section 7939 of the Revised Codes of Montana of 1921.

VIII.

This defendant admits that the plaintiffs entered in and upon said mine on or about the 26th day of June, 1921, and performed some work therein, and thereon, and extracted some ores therefrom; and, except as herein above admitted, denies each and every allegation of the *eight* paragraph thereof.

IX.

This defendant denies each and every allegation of the ninth paragraph of said first count, and, in this connection alleges:

That the pretended contract therein set forth was and is void under the provisions of paragraphs 1 to 5 of Section 7519, Section 7593, and Section 7939, of the Revised Codes of Montana, of 1921.

X.

This defendant denies each and every allegation of the tenth paragraph thereof.

XI.

This defendant admits that at the times set forth in the eleventh paragraph the plaintiffs, or some of them, performed some work in and upon said mine, and extracted some ores therefrom; and, except as hereinabove admitted, denies each and every allegation in said eleventh paragraph contained. [24]

XII.

This defendant admits that some ores were shipped from said mine, which had been mined by the plaintiffs, or some of them, and in this connection this defendant alleges that the plaintiffs were fully paid for all work, labor and services performed by them or any of them, and, except as hereinabove admitted, this defendant denies each and every allegation of the twelfth paragraph thereof.

XIII.

This defendant denies each and every allegation of the thirteenth paragraph of said first count in said amended complaint contained.

XIV.

This defendant denies each and every allegation of the fourteenth paragraph of said first count.

XV.

This defendant denies each and every allegation of the fifteenth paragraph of said first count.

XVI.

This defendant denies generally each and every allegation in said first count contained, not hereinbefore specifically admitted or denied.

Second Count.

I.

Admits each and every allegation of the first paragraph thereof.

II.

Admits each and every allegation of the second paragraph thereof.

III.

Admits that this answering defendant was at the times mentioned in said amended complaint, engaged in mining ores at the said Goldsmith Mine, in the County of Silver Bow, and State of Montana; and, except as herein admitted, denies each and every [25] allegation of the third paragraph thereof.

IV.

Admits that Matt W. Alderson was, at the times mentioned in said amended complaint, the general manager and superintendent of this answering defendant; and, save as hereinabove admitted, denies each and every allegation in said fourth paragraph contained.

V.

This defendant denies each and every allegation of the fifth paragraph thereof.

VI.

This defendant denies each and every allegation of the sixth paragraph thereof.

VII.

This defendant denies each and every allegation of the seventh paragraph of said second count, and, in this connection, alleges:

That said pretended contract was and is void under and by virtue of the provisions of paragraphs 1 to 5 of Section 7519, Section 7593 and Section 7939 of the Revised Codes of Montana of 1921.

VIII.

This defendant admits that the plaintiffs entered in and upon said mine, on or about the 26th day of June, 1921, and performed some work therein, and thereon, and extracted some ores therefrom; and, except as herein above admitted, denies each and every allegation of the *eight* paragraph thereof.

IX.

This defendant denies each and every allegation of the ninth paragraph of said second count, and, in this connection alleges:

That the pretended contract therein set forth was and is void under the provisions of paragraphs 1 to 5 of Section 7519, Section 7593, and Section 7939 of the Revised Codes of Montana, [26] of 1921.

X.

This defendant denies each and every allegation of the tenth paragraph thereof.

XI.

This defendant admits that at the times set forth in the eleventh paragraph, the plaintiffs, or some of them, performed some work in and upon said mine, and extracted some ores therefrom; and, except as hereinabove admitted, denies each and every allegation in said paragraph contained.

XII.

This defendant admits that some ores were

shipped from said mine, which had been mined by the plaintiffs, or some of them, and in this connection alleges that the plaintiffs were fully paid for all work, labor and services performed by them, or either of them, and, except as hereinabove admitted, this defendant denies each and every allegation of the twelfth paragraph thereof.

XIII.

This defendant denies each and every allegation of the thirteenth paragraph of said second count in said amended complaint contained.

XIV.

This defendant denies each and every allegation of the fourteenth paragraph of said second count.

XV.

This defendant denies each and every allegation of the fifteenth paragraph of said second count.

XVI.

This defendant denies each and every allegation of the sixteenth paragraph of said second count.

XVII.

This defendant denies each and every allegation of the seventeenth paragraph of said second count. [27]

XVIII.

This defendant denies each and every allegation of the eighteenth paragraph of said second count.

XIX.

This defendant denies each and every allegation of the nineteenth paragraph of said second count.

XX.

This defendant denies each and every allegation of the twentieth paragraph of said second count.

XXI.

This defendant denies each and every allegation of the twenty-first paragraph of said second count.

XXII.

This defendant denies each and every allegation of the twenty-second paragraph of said second count.

XXIII.

This defendant denies generally, each and every allegation in said second count contained, not hereinbefore specifically admitted or denied.

XXIV.

This defendant further alleges that there is a defect and misjoinder of parties plaintiff in this action, in that the said John Pagleero and Frank Tamietti, two of the plaintiffs above named, are not now and were not at any time mentioned in said complaint members of any copartnership with Lawrence Monzetti, Pete Gaido and Batt Tamietti or any of them.

WHEREFORE, this defendant having fully answered prays to be hence dismissed with costs.

WALKER & WALKER,
C. S. WAGNER,
Attorneys for Defendant.

(Duly verified.)

Filed Aug. 18, 1924. C. R. Garlow, Clerk. [28]

Thereafter, on Sept. 6, 1924, reply was filed as follows:

(Title of Court and Cause.)

REPLY.

Come now the plaintiffs above named, and for their reply to the answer of the defendant on file herein, deny as follows:

First Count.

1.

Deny each and every allegation contained in the 7th paragraph of the said answer to the first count.

2.

Deny each and every allegation contained in the 9th paragraph of the said answer to the first count.

3.

Deny each and every allegation contained in paragraph 12 of the said answer to the first count.

4.

Deny generally each and every allegation contained in said answer to the first count not hereinbefore specifically admitted or denied.

Come now the plaintiffs above named, and for their reply to the answer of the said defendant on file herein, deny as follows:

Second Count.

1.

Deny each and every allegation contained in

the 7th paragraph of the said answer to the second count.

2.

Deny each and every allegation contained in the 9th [29] paragraph of the said answer to the second count.

3.

Deny each and every allegation contained in paragraph 12 of the said answer to the second count.

4.

Deny each and every allegation contained in paragraph 24 of the said answer to the second count.

5.

Deny generally each and every allegation contained in said answer to the second count not hereinbefore specifically admitted, or denied.

WHEREFORE, plaintiffs repeat the prayer of their complaint herein.

H. A. TYVAND,
F. E. McCRACKEN,
Attorneys for Plaintiffs.

(Duly verified.)

Filed Sept. 6th, 1924. C. R. Garlow, Clerk.

Thereafter, on December 3d, 4th and 5th, 1924, said cause was tried, and the record of said trial is in the words and figures as follows, to wit: [30]

(Title of Court and Cause.)

TRIAL.

3d day of December, 1924.

This cause came on regularly for trial this day, H. A. Tyvand, Esq., and F. E. McCracken, Esq., appearing for the plaintiffs and T. J. Walker, Esq., and C. S. Wagner, Esq., appearing for defendant. Thereupon the following were duly impaneled, accepted and sworn as a jury, to try the cause, viz.: Frank E. Brown, W. A. Triplett, Lewis Christensen, M. V. Conroy, Olive Penny, James Job, Thomas Tracy, Gus Meyer, John Jahreiss, T. C. Truscott, Frank S. Sadler, and Thomas Rodgers.

Thereupon Batt Tamietti was sworn as a witness for plaintiffs, whereupon defendant objected to any testimony relating to the causes of action set forth in the amended complaint, for the reason they do not state facts sufficient to constitute a cause of action, which objection was overruled, and the exception of defendant noted. Thereupon examination of the witness, Batt Tamietti, was proceeded with, whereupon defendant objected to any testimony relating to any conversations or agreement had with one Matt W. Alderson, former general manager of the defendant company and now deceased, and for the further reason that the plain-

tiffs are suing as mining copartners and it is not shown that they owned or acquired, according to the statute, the mining claim in question. Thereupon the objections were argued and submitted, and by the Court taken under advisement. Thereupon Court ordered that trial of cause proceed and the Court would later render its decision on defendant's objections. Thereupon further examination of the witness Tamietti was proceeded [31] with, and W. W. Pennington and Lawrence Monzeti were sworn and examined as witnesses for the plaintiffs, and certain documentary evidence, viz.: Plaintiffs' Exhibits "A," "B," "C," "D," "E," "G," "H," and "I" introduced, whereupon further trial was ordered continued until 10 A. M. to-morrow and the jury excused until such time.

Entered in open court December 3d, 1924.

C. R. GARLOW,
Clerk. [32]

(Title of Court and Cause.)

TRIAL (CONTINUED).

December 4, 1924.

Counsel for respective parties with the jury present as before, and trial of cause resumed. Thereupon Lawrence Monzetti was recalled and W. R. Richards, Pete Gaido, Harrison E. Clement and Frank Tamietti were sworn and examined as witnesses for the plaintiffs, and Plaintiffs' Exhibits "O," "Q" and "R" introduced in evidence,

exhibit "S" for plaintiffs not being admitted on objection, whereupon plaintiffs rested. Thereupon Joe Flaherty and John Pagleero were sworn and examined as witnesses for defendant and Frank Tamietti was recalled by defendant and Defendant's Exhibits "J," "K," "L," "M," "N" and "P," and a certain offer in tender introduced in evidence, whereupon defendant rested.

Thereupon Lawrence Monzetti was recalled for further examination, and Batt Tamietti was recalled and testified in rebuttal, whereupon the evidence closed. Thereupon defendant moved the Court to direct the jury to return a verdict herein in favor of the defendant and against the plaintiffs Gaido, Frank Tamietti and Pagleero, for the reason that the evidence shows that said plaintiffs have no interest in this litigation, but have settled with the defendant company, and that the Court direct the jury to return a verdict in favor of the defendant and against all of the plaintiffs herein on the ground that there is a fatal variance between the allegations and the proofs and for other reasons stated. Thereupon said motions were argued by counsel and submitted and by the Court taken under advisement.

Entered in open court December 4th, 1924.

C. R. GARLOW,
Clerk. [33]

TRIAL (CONTINUED).

December 5, 1924.

(Title of Court and Cause.)

Counsel for respective parties, with the jury present as before, and trial of cause resumed. Thereupon Court ordered that defendant's motion for a directed verdict made herein on yesterday be granted as to the second count to amended complaint, and denied as to the first count of said amended complaint, and the jury was thereupon instructed to return a verdict in favor of the defendant and against the plaintiffs as to the second count of the amended complaint. Thereupon after the arguments of counsel and the instructions of the Court, the jury retired to consider of its verdict. Thereupon the defendant excepted to the Court's refusal to give the requested instructions, and to certain of the instructions given by the Court, exception duly noted. Thereafter, the jury returned into court with its verdict, F. E. McCracken, Esq., being present as attorney for the plaintiffs, and C. S. Wagner, Esq., being present as attorney for defendant, which verdict was received by the Court and ordered filed and read, and by the jury acknowledged to be its true verdict, being as follows, to wit:

> "We the jury in the above-entitled court and action find our verdict in favor of the plaintiffs Batt Tamietti and Pete Gaido, and against the defendant and assess plaintiffs' damages in the sum of Seven Hundred Seventy and 66/100 ($770.66) Dollars each.
>
> M. V. CONROY,
> Foreman."

Thereupon Court ordered judgment entered accordingly.

Entered in open court December 5th, 1924.

C. R. GARLOW,
Clerk.

Thereafter, on December 5th, 1924, a verdict was duly rendered and filed herein, which verdict is in the words and figures as follows, to wit: [34]

(Title of Court and Cause.)

VERDICT.

We, the jury in the above-entitled court and action, find our verdict in favor of the plaintiffs Batt Tamietti and Pete Gaido, and against the defendant, and assess plaintiffs' damages in the sum of Seven Hundred Seventy and 66/100 ($770.66) Dollars each.

M. V. CONROY,
Foreman.

Filed December 5, 1924. C. R. Garlow, Clerk.

Thereafter, on December 6th, 1924, an order extending time to file and serve bill of exceptions was duly made and entered herein, which order is in the words and figures as follows, to wit: [35]

(Title of Court and Cause.)

ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS THIRTY DAYS.

Saturday, December 6, 1924.

On motion of T. J. Walker, Esq., attorney for defendant herein, Court ordered that defendant be granted thirty (30) days in addition to the time allowed by rule within which to serve and file bill of exceptions.

Entered in open court December 6th, 1924.

C. R. GARLOW,
Clerk.

Thereafter, on the 6th day of December, 1924, a judgment was duly entered herein, which judgment is in the words and figures as follows, to wit: [36]

(Title of Court and Cause.)

JUDGMENT.

BE IT REMEMBERED, that this cause came regularly on for trial on Wednesday the 3d day of December, 1924, the plaintiffs were represented by Messrs. H. A. Tyvand and F. E. McCracken. The defendant was represented by Messrs. Walker and Walker and C. S. Wagner. The same came on before the Honorable Charles N. Pray, Judge presiding. A jury of twelve men were duly impaneled and sworn to try the case. Evidence was introduced on behalf of the plaintiffs and on behalf of the defendant. The amended complaint contained

two causes of action; as to the second cause of action, the Court directed the jury to return a verdict in favor of the defendant after all the evidence had been introduced. After argument of counsel, the Court instructed the jury as to the law, and the jury retired in custody of a sworn bailiff to consider of their verdict, which after title of court and cause is as follows, to wit:

> "We, the jury in the above-entitled court and action find our verdict in favor of the plaintiffs Batt Tamietti and Pete Gaido, and against the defendant, and assess plaintiffs' damages in the sum of Seven Hundred Seventy and 66/100 ($770.66) Dollars each.
>
> M. V. CONROY,
> Foreman."

WHEREFORE, by reason of the law and the premises, IT IS ORDERED, ADJUDGED and DECREED, and this does ORDER, ADJUDGE and DECREE, that plaintiff, Batt Tamietti, do have and recover of the defendant Crystal Copper Company, a corporation, the sum of Seven Hundred Seventy and 66/100 ($770.66) Dollars, that plaintiff Pete Gaido do have and recover of the defendant, Crystal Copper Company, a corporation, the sum of Seven Hundred Seventy and 66/100 ($770.66) Dollars, that said plaintiffs have and recover of said defendant costs of suit taxed in the sum of Twenty-one and 70/100 Dollars.

Dated this 6th day of December, 1924.

CHARLES N. PRAY,
Judge.

Entered December 6, 1924. C. R. Garlow, Clerk. [37]

Thereafter, on the 20th day of January, 1925, a bill of exceptions, duly settled and allowed, was filed herein, which bill of exceptions is in the words and figures as follows, to wit: [38]

In the District Court of the United States in and for the District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLEERO, and FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,

Defendant.

PROPOSED AMENDMENTS TO BILL OF EXCEPTIONS.

To the Defendant Above Named, Crystal Copper Company, and Walker & Walker and C. S. Wagner, Esqs., Its Attorneys:

You and each of you will please take notice that the following amendments are proposed on the part of the plaintiffs to the bill of exceptions proposed by the defendant, to wit:

FIRST: On page entitled "Plffs. Case—55," after line 11, insert the following:

"Mr. McCRACKEN.—Plaintiffs object to the introduction of exhibit 'J,' upon the grounds and for the reasons that the same is irrelevant and immaterial and not within the issues of this case, furthermore the same does not prove or tend to prove any of the issues of this case.

The COURT.—The objection is overruled.

Exception.

Mr. McCRACKEN.—Plaintiffs object to the introduction of exhibit 'K,' upon the grounds and for the reasons that the same is irrelevant and immaterial and not within the issues of this case, furthermore the same does not prove or tend to prove any of the issues of this case, also it fails to show any consideration for any pretended release as to the 300 shares of stock claimed by Monzetti, as he received nothing more than that which he had coming at that time. [39]

The COURT.—The objection is overruled.

Exception.

Mr. McCRACKEN.—Let the record show that plaintiffs make the same objection to exhibit 'L' as plaintiffs made to exhibits 'J' and 'K.'

The COURT.—Let the record so show and that the objection is overruled.

Exception."

Mr. McCRACKEN.—Plaintiffs make the same objection to exhibit 'M' as made to exhibits 'J,' 'K' and 'L.'

The COURT.—Let the record show the same objection and that the objection is overruled.

Exceptions."

Mr. McCRACKEN.—Plaintiffs object to the introduction of exhibit 'N,' upon the grounds and for the reasons that the same is irrelevant and immaterial and not within the issues of this case, furthermore the same does not prove or tend to prove any of the issues of this case, also it fails to show any consideration for any pretended release by Monzetti, as he received nothing more than that which he had coming at that time.

The COURT.—The objection is overruled.

Exception."

SECOND: On page entitled "Defts. Case—106," after line 17, insert the following:

"Mr. McCRACKEN.—If the Court please, plaintiffs move the Court to strike from the evidence Defendant's Exhibit 'J,' upon the grounds and for the reasons that the same is irrelevant and immaterial, that no consideration has been shown for the same, as Monzetti received nothing more than that which he had coming at that time, furthermore the signature was obtained at a time Monzetti was incompetent to act and did not know what he was doing, furthermore he was unable to read or write, also it does not prove or tend to prove any of the issues in this case as no release was plead in the answer. [40]

The COURT.—The motion will be denied.

Exception.

Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit 'K,' as was made to exhibit 'J.'

The COURT.—Let the record show the same

motion as to Defendant's Exhibit 'K' and that the motion is denied.

Exception.

Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit 'L' as was made to exhibits 'J' and 'K.'

The COURT.—Let the record show the same motion as to Defendant's Exhibit 'L' and that the motion is denied.

Exception.

Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit 'M' as was made to exhibits 'J,' 'K' and 'L.'

The COURT.—Let the record show the same motion as to Defendant's Exhibit 'M' and that the motion is denied.

Exception.

Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit 'N' as was made to exhibits 'J,' 'K,' 'L' and 'M.'

The COURT.—Let the record show the same motion as to Defendant's Exhibit 'N' and that the motion is denied.

Exception."

The foregoing proposed amendments are offered and proposed upon the grounds and for the reasons that the said objection and motions were made at the trial of said cause and are not included in the proposed bill of exceptions and that exceptions

were noted by the plaintiffs to the rulings of the Court.

H. A. TYVAND and
F. E. McCRACKEN,
Attorneys for Plaintiffs.

Service of the foregoing proposed amendments to bill of exceptions and copy received this 8th day of January, 1925, and may be allowed by the Court or Judge.

WALKER & WALKER,
C. S. WAGNER,
Attorneys for Defendant.

Filed Jan. 8, 1925. C. R. Garlow, Clerk. [41]

In the District Court of the United States in and for the District of Montana.

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLEERO and FRANK TAMIETTI,
Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,
Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED that in the above-entitled case, Lawrence Monzetti, Pete Gaido, Batt Tamietti, John Pagleero and Frank Tamietti, plaintiffs, brought their suit against Crystal Copper Company, a corporation, defendant; that the cause

(Testimony of Batt Tamietti.)

came on for trial before Hon. Charles N. Pray, the Judge presiding, sitting with a jury, on the 23d day of November, 1924, in the Federal courtroom in the city of Butte, Silver Bow County, Montana. Whereupon the following proceedings were had and done, testimony taken, the rulings of the Court hereinafter set forth were made, and the exceptions of the parties thereto noted:

Present: H. A. TYVAND, Esq., Attorney for the Plaintiffs.

F. E. McCRACKEN, Esq., Attorney for Plaintiffs.

THOMAS J. WALKER, Esq., Attorney for Defendant.

CHARLES S. WAGNER, Esq., Attorney for Defendant. [42]

TESTIMONY OF BATT TAMIETTI, FOR PLAINTIFFS.

BATT TAMIETTI, one of the plaintiffs, called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. McCRACKEN.

Q. State your name, please.

Mr. WAGNER.—At this time, if the Court please, we object to the cause of action set forth in the complaint, in the first cause of action, on the ground and for the reason that it does not state facts sufficient to constitute a cause of action. We make the same objection to the cause of action set forth in part 2 of the complaint, that it does not

(Testimony of Batt Tamietti.)

state facts sufficient to constitute a cause of action. This is merely submitted for the purpose of saving the record.

The COURT.—That matter, I suppose, has been threshed out heretofore on demurrer.

Mr. TYVAND.—Yes, and on the former trial also it was argued.

The COURT.—Very well, the Court will overrule the objection.

Mr. WAGNER.—Note an exception.

A. Batt Tamietti.

The WITNESS.— I am one of the plaintiffs in this action, and reside at 320 West Daly Street, Walkerville. I am a miner by occupation, and have worked in the mines for about 26 years, which time has been spent here in Butte. I worked for a little while outside of Butte, not more than six months or a year, in British Columbia. I am acquainted with the Goldsmith mine, north of Walkerville, in Silver Bow County, Montana, and was acquainted with Matt W. Alderson during his lifetime. At the time I was acquainted with Mr. Alderson he was general manager of the [43] Crystal Copper Company, the defendant in this action. I knew Mr. Alderson since the year 1920, and was acquainted with him on or about the 26th of June, 1921.

Q. Did you have any business transactions with Mr. Alderson as general manager of the Crystal Copper Company, on or about the 26th of June, 1921?

(Testimony of Batt Tamietti.)

Mr. WAGNER.—Wait a minute. We object, may it please the Court, on the ground and for the reason that it appears already from the testimony, at least from one of the questions propounded by counsel, that Matt W. Alderson is dead. He was the general manager of the company, and under the express provisions of subdivision 4 of Section 10535 of the Revised Codes of Montana of 1921, the plaintiffs would be incompetent to testify as to direct transactions or communications between themselves and the deceased agent of the corporation.

The paragraph which I refer to, may it please the Court, reads as follows: Subdivision 4. "The following witnesses are incompetent. Subdivision 4. "Parties or assignors of parties to an action or proceeding or persons in whose behalf an action or proceeding is prosecuted against any person or corporation, as to the facts of direct transaction or oral communications between the proposed witness and the deceased agent of such person or corporation, and between such proposed witness and any deceased officer of such corporation, except when it appears to the court that without the testimony of the witness injustice will be done."

(Arguments.)

The COURT.—We will pass that for the time being and the Court will pass on that later. [44]

Mr. WAGNER.—We note an exception to the ruling of the Court.

A. Yes, sir.

(Testimony of Batt Tamietti.)

Q. What was that transaction?

Mr. WAGNER.—At this time, may it please the Court, we object on the ground and for the reason that the complaint in this case shows upon its face that the plaintiffs seek recovery upon an alleged oral lease entered into between themselves and the defendant corporation, through the instrumentality of an agent or general manager of the corporation, that therefore the complaint discloses that while the alleged contract is denominated as a lease, it is in law and under the allegations of the complaint a parol license to enter into and upon the Goldsmith mine, for the purpose of working the same, and being a license rather than a lease the complaint fails to state facts sufficient to warrant a recovery, in that recovery is sought upon the basis of a prospective privilege or profits to be earned in the future, whereas, under the license they are limited to recovery, if recovery may be had at all, for ores actually removed from the place and mined. In other words, their recovery is limited to a share of the proceeds of personal property after removed from the mine. Further, we object to the testimony because the plaintiffs in this action seek a recovery upon the proposition that they are a mining partnership, having sued as a mining partnership, and under the laws of the State of Montana, their holding being that of licensees, there is no allegation in the complaint that they own the Goldsmith mine or acquired an interest in the Goldsmith mine itself, such as is required to constitute

(Testimony of Batt Tamietti.)

a mining partnership, and having undertaken to recover as a mining copartnership, they may not recover in this action as individuals upon any theory. Further, we [45] object to any further testimony in this case, upon the ground that the complaint shows upon its face that the alleged contract was an oral contract, and is therefore void under the statute of frauds, particularly sections 7593, 7599, subdivision 5, section 7939, all of the Civil Code, and sections 10611 and 10613 of the Code of Civil Procedure, all being sections of the Revised Codes of Montana of 1921. And we object, further, that the complaint shows upon its face that the alleged contract sued upon, though oral, is so vague, indefinite and uncertain in its terms as to be void and not enforceable, and that it would require the Court to make a contract for the parties in order to recover on any theory of the case.

(Jury excused. Arguments.)

The COURT.—Is Matt W. Alderson the only person with whom the plaintiffs had any dealings whatsoever entering into this agreement?

Mr. WALKER.—I think so, your Honor.

Mr. TYVAND.—Yes, your Honor.

The COURT.—You have no other way whatsoever of proving the transaction with the Crystal Copper Company, with the exception of the transaction with Matt W. Alderson?

Mr. TYVAND.—No, that is the only way.

The COURT.—When did he die?

(Testimony of Batt Tamietti.)

Mr. WAGNER.—He died last summer,—1923, a few months after the last trial.

The COURT.—When was this suit brought?

Mr. TYVAND.—It was brought a year and a half ago. November 25th, 1922. [46]

The COURT.—It was brought while Mr. Alderson was alive?

Mr. TYVAND.—Yes, he was here at the former trial and testified.

The COURT.—What became of that case?

Mr. TYVAND.—It was a mistrial, because we didn't have some of the parties we should have had and the Court allowed us to bring the other parties in as plaintiffs, and Mr. Alderson was here as a witness at that time, and here on the stand.

The COURT.—He testified on the part of the plaintiff?

Mr. TYVAND.—We called him, yes.

The COURT.—And his testimony is preserved, I suppose?

Mr. TYVAND.—Yes, we have it here.

Mr. WAGNER.—But Mr. Alderson was not a witness for us. The case terminated on the conclusion of the plaintiff's case.

(Arguments.)

(Recess until 2 P. M.)

The COURT.—Well, go ahead and put in your proof, and between now and to-morrow morning we will probably be able to thresh out the proposition of law and if you have any points on the part of the plaintiff, get them together, and submit any-

(Testimony of Batt Tamietti.)

thing bearing on this, in addition to what you have stated and the cases you have referred to. The Court will endeavor in the meantime between now and to-morrow morning to go over the matter and arrive at some decision if possible. Meantime we will call in the jury and proceed with the case. [47]

Q. (Question read as follows: "What was that transaction?")

A. On the 26th day of June, 1921, I heard from Mr. Frank Tamietti that Mr. Alderson, the manager of the Crystal Copper Company, that he wanted to lease a portion of the Goldsmith mine in the northwest of the claim, and so as soon as we heard that we decided together and we went and sent Frank Tamietti to see after we were all there in the house, we agreed to go up and see Mr. Alderson about the terms and conditions of this lease. So the condition and the term of this lease, whatever it was, we were doing on our part was satisfactory; and the term and condition was to pay so much for royalty, and after we paid the royalty divide from the net profit, divide fifty-fifty, and the condition was to sink fifteen feet more in the winze there, that it was down 35 feet already, and then we had the right to extract all the ores there was there on both sides, east and west, and if we were doing some improvement work from that deep up, north from that deep fifteen feet up to the level; if we were doing some extra work, you know, cross-cutting north and south and find

(Testimony of Batt Tamietti.)

some ore maybe, and have the right to take it all out, too.

Mr. WAGNER.—Just a minute. In order to save the record and expedite proceedings, we move the answer be stricken and urge the same grounds urged in the objection to any future testimony the witness may give,—we will ask to save the record that way, the same objections may apply, motions to strike and the same ruling.

The COURT.—It is so understood, the objection goes to all this testimony.

Q. When you referred to your partners, who did you refer to? When you spoke of your partners, what people did you speak of? [48]

A. Mr. Alderson and Mr. Lawrence Monzetti, and Mr. Frank Tamietti, and Mr. Pete Gaido, and myself, Batt Tamietti, and John Pagleero.

Q. Was Mr. Alderson one of your partners?

A. No, all the rest were my partners.

Q. What level in the mine was this winze you were going to work in?

A. The 500 foot level, the No. 1 Goldsmith shaft.

Q. How far was that from the shaft?

A. Northwesterly about a thousand feet.

The WITNESS.—The royalties, we were to pay were on ore of a value of twenty-five dollars a ton, $11.50; on ore of the value of from twenty-five to fifty dollars, we have to pay $23.00, and from fifty to a hundred dollars, we have to pay $34.00, and from $100.00 to $200.00 we have to pay $50.00, and from two hundred up, we have to pay 56% royalty.

(Testimony of Batt Tamietti.)

This royalty was to be paid to the Clark bank. We used to pay all the expenses of shipment and treatment before paying the royalty, and then we paid according to the value of the ore, so much per cent, and then divided fifty-fifty on the net, divided fifty-fifty with the Crystal Copper Company. I and my partners were to have the other half. The ground or territory which we were to have, the lease, was to sink complete fifty feet in this winze, and then we would have the right to take all the ore there was east and west of that winze, and if we did some improvement work on the hanging and foot wall, would have the right to take it out too; have all the ore as far as it went. I spoke of fifty feet, and that was from the level, the 500 foot level. The winze was 35 feet deep before we started. The Crystal Copper [49] Company was to furnish the machinery, tools, supplies, powder, fuse, caps, timber, and everything, and we have to do the work. The company was to hoist the ore and the waste, from the level, the 500 foot level, but we were to run it out to the shaft. When we started to work there there was about 10 or 12 feet of water in the winze, and we had water all the time we sank.

Q. And did you accept the terms of the lease?

Mr. WAGNER.—We object to that as being leading and suggestive and calling for the conclusion of the witness.

The COURT.—The objection is overruled.

Mr. WAGNER.—Exception.

A. Yes, sir, we accepted it in that way.

(Testimony of Batt Tamietti.)

We started to work on the night of the 26th of June, at ten o'clock, started sinking in the winze; started to rustle a pump and connect this pump and then started to work pumping the water, and after we had the water out we started to clean out lots of dirt that was around the winze in the bottom, and then of course started to blast, and timber and do anything we needed. It was only waste at that time. We sank down to the depth of about 45 feet before we had ore, and discovered ore about that point, in the far corner of the east winze. We continued to sink until we had about fifty-one, fifty-one and a half or fifty-two feet and then the ore was going down and we had to sink more, and Mr. Alderson, he used to generally come down every day in the mine, and we were working there together, the five, except when we used to hoist all the ore and the waste; we had a little ore, to hoist on the level—we were not four there working; one hoisting the ore and the waste, and we asked permission of Mr. Alderson if we cannot sink more on this lead, and Mr. Alderson say "Sure," he said, "down in this winze," he [50] said, "until the ore is gone; the more you sink the more ore you are going to have up over your head; and you fellows going to make money and the company going to make money." So we keep on going and sinking until we were about 75 feet deep, and something come across from the west side, they call it a fault, and it cut all the ore out, so we agreed, our partners together, no more use to sink in here, there's no more ore and better notify Mr. Alderson

(Testimony of Batt Tamietti.)

that we intended to quit. All right. As soon as we went on top at noon-time we saw Mr. Alderson and notified him about it. Well, he would be down tomorrow, he said, and so all right. He come down the next day and he said, "All right, just sink in a sump enough to hold the water between one shift and another, and then," he say, "you can take out all the ore as quick as you can." So we start right away to sink a little bit of sump and then we went east and west extracting ore, the way the lead go, you see.

Four of us started to work in this winze on the night of the 26th, Mr. Lawrence Monzetti, Mr. Pete Gaido, and Mr. John Payleero, but our lease, when we went up to take this lease, was to be with five partners, but at that time Mr. Frank Tamietti was sick, but we were to take him in when he was able to work and accept him as a partner. He came to work there some time in July, the 15th or 20th, 1921, after we had struck the ore.

The terms of the extension were the same conditions as when we started to work there, exactly the same condition as to royalty and everything else, we were to follow the ore as far as it went. The ore in the bottom of the winze, in some places was fourteen feet wide. When we completed the sump we went east and west and we started to stope and he told us to send up all [51] the ore we can. This lead only went west about nine or ten feet, west of the winze. We drifted in about 100 feet east of the winze, all the way in the lead. The lead close to

(Testimony of Batt Tamietti.)

the winze was bigger than inside, but we averaged up that the lead was from four feet, three and a half, four feet, three feet, or an average of three and a half feet. We stoped above the winze and then we stoped about twenty feet east of the winze, in length about twenty feet in height. That was from the bottom of the drift. When we got about 100 feet east of the winze the ground we were in in this 100 feet we found something like a fault, you know, where the lead was kind of splitting in four or five branches, and we thought to leave it there for the present, as it would not pay to go ahead and work, but after that maybe we were intending to go, but not at the present. We used to timber close to the winze and put in poles and put in tracks and put in chutes and put in slides, when we were intending to take this ore out; we had three or four chutes in, and we had a slide, and there was nothing more to do, it was just ready to fall into the chutes. After we had completed this kind of work we had further transactions with the company in regard to more territory. We knew that there used to be another lead in the foot, and we agreed to take out a foot lead, first to take all the ore out from the hanging; if we take the lead from the hanging first, and then take the foot lead; it was dangerous, and we cannot hold the hanging any more; so we agreed to put in a cross-cut in the foot and go into the foot lead and we started to cross-cut in the foot lead until we had this other lead, and we find it, and it was two feet and a half to three feet wide.

(Testimony of Batt Tamietti.)

We drove that cross-cut about twenty feet. We agreed to drive [52] that in, between myself and Mr. John Pagleero, Mr. Frank Tamietti, Mr. Lawrence Monzetti and Mr. Pete Gaido, and the company was glad if we were going to find some ore, and that was all right, and say, "The more ore you find the better it is for the company and better for you fellows." Mr. Alderson, the manager of the company, told us that.

We took assays and samples. I just had time to go through this lead and then we took one sample in both sides of the face, and I gave them to Mr. Alderson, and Mr. Alderson carried it down to the assayers and I received it the day after. I took the samples of the ore on the hanging-wall side, the first ore we worked in; generally used to take one sample every day. This ore that seemed to split up on the east end of this drift cut up pretty near straight, about 80 degrees to the west, that is, using the bottom of the drift as the base. The ore ran from 9 to 10 feet west of the winze, and cut off there at about 65 degrees east, using the bottom, 55 degrees.

During the time we worked in this winze and drifting east and stoping, we shipped ore, shipped ten carloads, not quite fifty tons to the carload, and the ore was shipped in the name of the Crystal Copper Company. Plaintiff's proposed exhibit "A" which you show me I saw before; saw them every time we made a shipment. This came from the smelter, East Helena, and was shipped by the

(Testimony of Batt Tamietti.)

Goldsmith mine. The handwriting on the back of this is Mr. Alderson's, the manager of the Crystal Copper Company. We received the money that the back of these returns purports to have been paid us on those returns. This is for my share. [53]

Mr. McCRACKEN.—We ask to introduce exhibit "A" in evidence.

Mr. WAGNER.—We object, may it please the Court, for the reason that no sufficient foundation has been laid for their introduction for any purpose; there is no claim in this complaint that the plaintiffs were not paid for all ore that they shipped; we cannot see any relevancy at this time.

Mr. McCRACKEN.—These are offered to be introduced for the purpose of showing the value of the ore to make an estimate of the value of the ore remaining in any place, and it furthermore shows ratification on the part of the company.

Mr. WALKER.—We object on the further ground for the reason that it is not any evidence as to the measure of damage in this case, not competent or material for that purpose, nor any evidence of any ratification.

The COURT.—The witness claims this to be part of the shipment of the ten cars?

Mr. McCRACKEN.—Part of it; yes, sir.

The COURT.—Well, for the present I will overrule the objection.

Mr. WAGNER.—Exception.

(Papers received in evidence, marked "Plaintiffs' Exhibit "A," and are as follows:) [54]

PLAINTIFF'S EXHIBIT "A."

AMERICAN SMELTING AND REFINING CO.
East Helena Plant, East Helena, Mont.
Ore Settlement Sheet.

Mine—Goldsmith. Shipping Point—Butte.
Bought of Crystal Copper Co. Date—Oct. 4, 1921.

Assays Per Ton.		Percentage.	
Gold	.43 Ounces	for 95 Per Cent @	$20.
Silver	52.7 Ounces	for 100 Per Cent @	.99¼
Lead	Per Cent	for 90 Per Cent @	
Copper	Per Cent	" 100% Dry (Wet Less 1.3	@
Insoluble			@
Iron	Per Cent		@
Manganese	Per Cent		@
Lime	Per Cent		@
Zinc	3.2 Per Cent	Over Per Cent	@ .30
Sulphur	Per Cent		
Speiss	Per Cent		

Serial Number	Our Number	Car Number	Gross Weight	a/c Moisture
2193	2255	58561	114460	2.8

Mine No.
24

Date of B/L.
Date of arrival, Sept. 28, 1921.
Quotations:
Silver .99¼
Lead ——
Copper ——.

AMERICAN SMELTING AND REFINING CO.

By M.

Keep this Statement.
Checked by W. [55]

Prices.	Debit	Credit
Gold—Per Ounce Less Treatment		8.17
Silver—Per Ounce 5% @ .99¼ per Oz.	2.62	52.30
Lead—Per Cwt. less cts. per lb.		
Copper—Per lb. less cts. per lb.		
Insoluble—Per Unit		
Iron—Per Unit		
Manganese—Per Unit		
Lime—Per Unit		
Zinc—Per Unit	.96	
Sulphur and speiss treatment, per ton	11.00	
Totals	14.58	60.47
		45.89

Number of Sacks.	Net Weight	Per Ton	
Weight of Sacks.	111255	45.89	2552.75
Freight			132.77
War Tax			3.98
Additional freight on bullion to New York 90% of the lead @ $6.35 per ton plus increase of $6.15 per ton effective August, 1920.			
Sampling			
Totals		136.75	2552.76
Net Proceeds			2416.00

A charge of five dollars made for sampling on all lots of ore containing less than five tons. Rates subject to shange without notice except on contracts for specified time or specified tonnage. [56]

Notations on back of foregoing exhibit:

Net proceeds $2416.00
23% royalty 555.68

Returns from smelter.....$1860.32
Leasers—one-half 930.16

Ardession—Inders Accident $2.10
Bawden—Loading 6.50
Miller—Loading 6.50
Ardession, Labor, 21 days, $99.75 98.75

$113.85 Minus 113.85

Less hosp. dues
To be divided 930.16—918.10=$1734.41.

[57]

Butte, Montana, January 31, 1922.

East Butte Copper Mining Co.,
Pittsmont Smelter.

Ore received from Crystal Copper Company. Location, Goldsmith Mine.

Lot No. 8519. Mine No. 5. Date sampled, January 24, 1922.

Car No. 57962. Wet Weight, 88980. Moisture, 2.2. Dry Weight, 87022.

Assays: Elect Cu% .26; Ozs. Ag. 47.8; Ozs. Au. .36; % SiO_2 67.8; % FE. & Mn. 8.9; % Zn. 4.8.

Silver 2079.826 Ozs.; @ 90% 1871.843 Ozs. @ 99.625 .....$1864.82

Gold 15.664 Ozs. @ 90% 14.098 Ozs. @ $20.00 ..... 281.96

Gross Value $2146.78

Deductions:

Treatment Charges 43.511 Dry Tons @ $10.00 Gross value.....435.11

Freight 44.49, Wet tons @ 62½.... 27.81

462.92

$1683.86

W. A. Clark & Bros. 23% royalty.... 387.29

$1296.57

Figured by J. D. D.

Extension and footings correct—C. H. S.

Ore received and settlement correct—P. F. N.

Notations on back of foregoing sheet:

Net returns 1296.57

Leasers—one-half 648.28

Hospital dues, 6 persons.....$6.00

Indus. accident, 6 persons, ½ month each.... 7.80

7680—John Ardession 20.00

7681—Pete Pagliero, loading car, $12.00, 1 day 5 .....17.00

[58]

7682—John Spehar, loading car..... 8.00

7683—Matt Suttey, loading car..... 8.00

7684—E. H. Walker, stock sub. 125.00

7685—Harry Daniels, 10 days..... .50.00

7686—Pete Giago, 13⅞ days..... 80.20

7687—Lawrence Mansanti, 14 days..... 80.85

7688—John Pagliero, 14 days..... 80.85
7689—Batt Tamietti, 14½ days..... 83.75
7691—Frank Tamietti, 14 days..... 80.85

$648.30

[59]

AMERICAN SMELTING AND REFINING CO.
East Helena Plant, East Helena, Mont.
Ore Settlement Sheet.

Mine—Goldsmith. Date—Oct. 27th, 1921.
Bought of Crystal Copper Company. Shipping Point—Butte.

	Assays Per Ton.	Percentage.
Gold	.43 Ounces	for 95 Per Cent @ $20.
Silver	55.4 Ounces	for 100 Per Cent .99¼
Lead		for 90 Per Cent @
Copper		for 100% Dry (Wet Less 1.3) @
Insoluble		
Iron		
Manganese		
Lime		
Zinc		Over Per Cent @ .30¢
Sulphur		
Speiss		

Serial Number	Our Number	Gross Weight	% Moisture	Number of Sacks
2423	2444	56475	3.2	

Mine No.
28

Date of B/L.
Date or arrival, Oct. 19th, 1921.
Quotations:
Silver .99¼
Lead
Copper

AMERICAN SMELTING AND REFINING CO.

By M.

Keep this Statement.
Checked by W. [60]

Prices:	Debit	Credit
Gold—Per Ounce, Less Treatment		8.17
Silver—Per Ounce 5% @ 99¼ per oz.	2.75	54.98
Lead—Per Ounce less —— cts. per lb.		
Copper—Per lb. less —— cts. per lb.		
Insoluble—Per Unit		
Iron—Per Unit		
Manganese—Per Unit		
Lime—Per Unit		
Zinc—Per Unit		
Sulphur and Speiss Treatment per ton 11.00		
Totals	15.31	63.15

Net value per ton.....47.84

Net Weight	Per Ton		
92870	47.84	2221.45	
Freight			111.93
War Tax			3.36
Sampling			
Totals			115.29 2221.45
Net Proceeds			2106.16

Additional freight on bullion to New York 90% of the lead at $6.35 per ton plus increase of $6.15, effective August, 1920.

A charge of five dollars made for sampling on all lots of ore containing less than five tons. Rates subject to change without notice except on contracts for specified time or specified tonnage. [61]

Notations on back of foregoing sheet:

	Leasers—one-half.	810.87
Goldsmith	2448.28	
Gross	2106.16	
Less 23%	484.42	
Net	1621.24	

Deductions:

Indus. Accident & Hosp. dues for 6 persons for October	21.60
7312—Pete Pagliero, car loader	12.00
7313—John Ardession, 20 days less $1 hosp. dues	94.00
7314—Stock sub. $25 each—5 persons	125.00
7315—Monzetti	114.70
7316—Pagliero	114.70
7317—Tamietti, Batt	114.70

7318—Tamietti, Frank 114.70
7319—Giago, Pete 99.45

$810.85

[62]

AMERICAN SMELTING AND REFINING CO.
East Helena Plant, East Helena, Mont.
Ore Settlement Sheet.

Mine—Goldsmith. Shipping Point—Butte.
Bought of Crystal Copper Company. Date—Nov. 26, 1921.

	Assays Per Ton.		Percentage.	
Gold	.49	Ounces	for 95 Per Cent @ $20.	
Silver	63.0	Ounces	for 100 Per Cent	.99⅝
Silver	63.0	Ounces	5% Treatment	.99⅝
Lead		Per Cent	for 90 Per Cent	
Copper		Per Cent	for 100% Dry (Wet Less 1.3)	
Insoluble		Per Cent		
Iron		Per Cent		
Manganese		Per Cent		
Lime		Per Cent		
Zinc	4.0	Per Cent	Over Per Cent	30¢
Sulphur		Per Cent		
Speiss		Per Cent		

Serial Number	Our Number	Car Number	Gross Weight	% Moisture	Number of Sacks
2719	2743	58902	116420	1.6	

Weight of Sacks

Mine No.
36

Date of B/L.
Date of arrival.
Quotations:
Silver, 99⅝
Lead
Copper

AMERICAN SMELTING AND REFINING CO.

Keep this Statement.
Checked by W. [63]

Prices:	By M. Debit.	Credit.
Gold—Per Ounce		9.31
Silver—Per Ounce.		62.76
Silver—Per Ounce.	3.14	
Lead—Per Cwt. Less —— cts. per lb.		
Copper—Per lb. less —— cts. per lb.		
Insoluble—Per Unit		
Iron—Per Unit		
Manganese—Per Unit		
Lime—Per Unit		
Zinc—30¢ Per Unit	1.20	
Sulphur & Speiss—Treatment, Per ton	11.00	
Totals	15.34	72.07
Net Value per ton		56.73

Net Weight.	Per Ton.		
114557	56.73		3249.41
Freight & War tax		146.52	
Umpire Assay			
Additional freight and War tax on Bullion to 90% of the Lead @ $6.85 per ton.			
Sampling			
Totals		146.52	3249.41
Net Proceeds			2102.89

Notations on back of foregoing sheet:

Returns from smelter	$3102.89	
Less 34½% royalty	1070.50	
Net returns to us	$2032.39	
Leasers—one-half	1016.195	
Hospital dues 6 persons, November		6.00

[64]

Industrial Accident, 6 persons, November	15.60
Check 7441—7442—Pete Pagliero, loading 3 cars	36.00
Check 7443—E. H. Walker, Secy., Stock Sub.	125.00
Check 7427—Frank Tamietti	100.00
Check 7444—Frank Tamietti	66.72
Check 7445—Batt Tamietti	166.72
Check 7446—Lawrence Mansanti	166.72
Check 7447—John Pagliero	166.72
Check 7448—Pete Giago	166.72
	1016.20

[65]

AMERICAN SMELTING AND REFINING CO.

East Helena Plant, East Helena, Mont.

Ore Settlement Sheet.

ine—Goldsmith. Shipping Point—Butte.

ought of Crystal C. Co. Date—Sept. 27, 1921.

	Assays Per Ton.		Percentage.	
old	.43	Ounces	for 95 Per Cent @ $20.	
lver	55.4	Ounces	for 100 Per Cent @	.99¼ per Oz.
ad		Per Cent		
pper		Per Cent		
soluble		Per Cent		
on		Per Cent		
anganese		Per Cent		
me		Per Cent		
nc	4.0	Per cent	Over Per Cent	.30
lphur		Per Cent		
eiss		Per Cent		

Serial Number	Our Number	Car Number	Gross Weight	% Moisture	Number of Sacks
2122	2122	58994	108100	3.5	

Mine No. 23. Weight of sacks.

Date of B/L.

Date of arrival, Sept. 24, 1921.

Quotations:

Silver .99¼

Lead

Copper

AMERICAN SMELTING AND REFINING CO.

By M.

Keep this statement.

Checked by W. [66]

Prices:	Debit.	Credit.
Gold—Per Ounce, Less Treatment		8.17
Silver—Per Ounce 5% @ .99¼ per Oz.	2.75	54.98
Lead—Per Cwt. less —— cts. per lb.		
Copper—Per lb. less —— cts. per lb.		
Insoluble—Per Unit		
Iron—Per Unit		
Manganest—Per Unit		
Lime—Per Unit		
Zinc—Per Unit	1.20	
Sulphur & Speiss, Treatment per ton	11.00	
Totals	14.95	63.15
Net value per ton		48.20
Net Weight. Per Ton. 104316 48.20		2514.02
Freight	125.61	
War Tax	3.77	
Additional freight on bullion to New York 90% of the lead @ $6.35 per ton plus increase of $6.15 per ton, effective August, 1920.		
Sampling		
Totals	129.38	2514.02
Net Proceeds		2384.64

(Testimony of Batt Tamietti.)

A charge of five dollars made for sampling on all lots of ore containing less than five tons. Rates subject to change without notice except on contracts for specified time or specified tonnage.

Notations on back of foregoing sheet:

Net Proceeds	$2384.64
Less 23% Royalty	548.47
Net return from smelter	$1836.17
Leasers—one-half	918.09

[67]

Check No. 7121—Frank Tamietti	$183.62
Check No. 7122—Batt Tamietti	183.62
Check No. 7123—Monzette	183.62
Check No. 7124—Pagliero	183.62
Check No. 7125—Giago	183.62
	$918.10

Filed Nov. 2, 1923. C. R. Garlow, Clerk.

Filed Dec. 15, 1923. C. R. Garlow, Clerk. [68]

The WITNESS.—This is Mr. Alderson's writing on plaintiffs' proposed exhibit "E." I never saw this exhibit before. I did not receive the money which purports to have been paid to me on the back of that. That $11.43 check I never have it. That is on the last car that was shipped, and I didn't receive that yet. On two of these other cars I didn't receive the money. For the cars that we shipped we paid $25.00, each partner, for shares of stock and didn't receive the stock; we received this money but not the stock. On this one we received the money but not the stock. On this shipment of Jan-

(Testimony of Batt Tamietti.)

uary the 31st, in exhibit "E," we received the money that is purported to have been paid on the back, received a check, and I guess we received the stock, but not on this one. On March 3d, we did not receive the money that is purported to have been paid me on the back. The money that was paid me is what purports to have been paid here on these three returns.

Mr. McCRACKEN.—We ask to have this introduced.

Mr. WALKER.—We object for the reason it does not prove or tend to prove any issue in this case. It is not any evidence of any measure of damage, and cannot be construed as such, and is incompetent evidence to prove any issue in the case.

The COURT.—The Court will allow it in evidence on the theory that it may illustrate some issue, throw some light on the transaction between the parties. It is only going in as far as the writing on the back of these papers is concerned.

Mr. WALKER.—We note an exception.

(Papers received in evidence, marked Plaintiff's Exhibit "E," and are as follows:) [69]

PLAINTIFFS' EXHIBIT "E."

AMERICAN SMELTING AND REFINING CO.

East Helena Plant, East Helena, Mont.

Ore Settlement Sheet.

Mine—Goldsmith. Shipping Point—Butte.

Bought of Crystal Copper Co Date—Dec. 9th, 1921.

Assays Per Ton.		Percentage.	
Gold	.66 Ounces	For 95 Per Cent @ $20.	
Silver	86.4 Ounces	For 100 Per Cent	.995/8
Silver	86.4 Ounces	5 Per Cent Treatment	.995/8
Lead—Per Cent		For 90%	
Copper—Per Cent		For 100% Dry (Wet Less 1.3)	
Insoluble—Per Cent			
Iron—Per Cent			
Manganese—Per Cent			
Lime—Per Cent			
Zinc—3.5 Per Cent		Over Per Cent 30¢	
Sulphur—Per Cent			
Speiss—Per Cent			

Serial Number	Our Number	Car Number	Gross Weight	% Moisture	Number of Sacks
2831	2900	57894	113240	6.6	

Mine No.
38.

Date of B/L.

Date of arrival, Dec. 3d, 1921.
Quotations:
Silver 99⅝
Lead
Copper

AMERICAN SMELTING AND REFINING CO.

By M.

Keep this statement.
Checked by W. [70]

Prices	Debit.	Credit.
Gold—Per Ounce		12.54
Silver—Per Ounce		86.08
Silver—Per Ounce	4.30	
Lead—Per cwt. Less —— cts. per lb.		
Copper—Per lb. Less —— cts. per lb.		
Insoluble—Per Unit		
Iron—Per Unit		
Manganese—Per Unit		
Lime—Per Unit		
Zinc—Per Unit	1.05	
Sulphur & Speiss, Treatment per ton	11.00	
Totals	16.35	98.62
Net Value per ton.....		82.27

Net Weight	Per Ton	
105766	82.27	4350.68
Freight & War tax		142.62
Umpire Assay		
Additional Freight and war tax on Bullion to 90% of the lead @ $6.85 per ton.		
Sampling		
Totals	142.62	4350.68
Net Proceeds		4208.06

A charge of five dollars made for sampling on all lots less than five tons. Rates subject to change without notice, except on contracts for specified time or specified tonnage. [71]

Notations on the back of foregoing sheet:

Net Proceeds	4208.06
Royalty at 34½%	1451.78
Net returns from smelter	2756.28
Leasers—one-half	1378.14

Time and expense of man checking smelter...40.00

7505—John Ardession, 28 days, Nov. 10 *days* to Dec. 10, 1921, less Hosp. dues $2.00	188.00
7506—Frank Tamietti	230.03
7507—Batt Tamietti	230.03
7508—John Pagliero	230.03
7509—Lawrence Mansanti	230.03
7510—Pete Giago	230.03
	$1378.15

7504—$25 deducted from each of above for check to E. H. Walker on stock sub.—making each check 205.03 instead of $230.03. [72]

AMERICAN SMELTING AND REFINING CO.
East Helena Plant, East Helena, Mont.

Ore Settlement Sheet.

Mine—Goldsmith. Shipping Point—Butte.
Bought of Crystal Copper Company. Date—Dec. 31st, 1921.

Assays Per Ton.		Percentage.	
Gold	.46 Ounces	For 95 Per Cent @	$20.
Silver	61.1 Ounces	For 100 Per Cent	.99⅝
Silver	61.1 Ounces	5% Treatment @	.99⅝
Lead—Per Cent		for 90 Per Cent	
Copper—Per Cent		For 100% Dry (Wet Less 1.3)	
Insoluble—Per Cent			
Iron—Per Cent			
Manganese—Per Cent			
Lime—Per Cent			
Zinc—3.7 Per Cent		Over Per Cent 30¢	
Sulphur—Per Cent			
Speiss—Per Cent			

Serial Number	Our Number	Car Number	Gross Weight	% Moisture	Number of Sacks
3008	3048	56538	101180	3.0	

Mine No. 40 — Weight of Sacks

Date of B/L.
Date of arrival, Dec. 27, 1921.
Quotations:
Silver 99⅝
Lead
Copper

AMERICAN SMELTING AND REFINING CO.

By M.

Keep this statement.
Checked by W. [73]

Prices.	Debit.	Credit.
Gold—Per Ounce		8.74
Silver—Per Ounce		60.87
Silver—Per Ounce	3.04	
Lead—Per cwt. Less —— cts. per lb..		
Copper—Per lb. Less —— cts. per lb.		
Insoluble—Per Unit		
Iron—Per Unit		
Manganese—Per Unit		
Lime—Per Unit		
Zinc—Per Unit	1.11	
Sulphur and Speiss, Treatment per ton	11.00	
Totals	15.15	69.61

Net value per ton.....54.46

Net Weight.	Per Ton.		
98145	54.46		2672.49
Freight and War tax		127.87	
Umpire Assay			
Additional freight and war tax on bullion to 90% of the lead @ $6.85 per ton.			
Sampling			
Totals		127.87	2672.49
Net proceeds			2544.62

A charge of five dollars made for sampling on all lots of ore containing less than five tons. Rates subject to change without notice, except on contracts for specified time or specified tonnage. [74]

Net Proceeds 2544.62
Royalty 34½% 877.89

Net from smelter.....1666.73
Leasers—one-half 833.37

Hosp. Dues 6.00, Industrial Accident, six persons, 15.60 ..... 21.60
Check No. 7578—John R. Ardession..... 82.50
Check No. 7579—E. H. Walker, Secy. 125.00
Check No. 7580—Lawrence Mansanti 126.16
Check No. 7581—John Pagliero 119.52
Check No. 7582—Batt Tamietti 126.16
Check No. 7583—Frank Tamietti 119.53
Check No. 7584—Pete Giago 112.90

$833.37

[75]

Butte, Montana, January 31, 1922.

East Butte Copper Mining Co.
Pittsmont Smelter.

Ore Received from Crystal Copper Company, Loaction—Goldsmith Mine. Lot No. 8519. Mine No. 5. Date Sampled—January 24, 1922.

Car No. 57962. Wet Weight 88980. % Moisture 2.2. Dry Weight 87022. Elec. Cu.% .26. Ozs. Ag. 47.8. Ozs. Au. .36. % SiO_2. 67. 8% Fe & Mn. 8.9 % Zn. 4.8.

Copper—None.

Silver 2079.826 Ozs. @ 90% 1871.843 Ozs. @ 99.625 .....1864.82

Gold 15.664 Ozs. @ 90% 14.098 Ozs. @ $20.00 ..... 281.96

Gross Value 2146.78

Deductions.

Treatment charges 43.511 Dry tons @ 10.00 .....$435.11

Freight 44.49 Wet tons @ 62½.. 27.81

War Tax. Hauling Wet tons. Switching 462.92

Net Value 1683.86

W. A. Clark & Bor. 23% Royalty.... 387.29

1296.57

Figured by J. D. H.

Extensions and footings correct—C. H. S.

Ore received and settlement correct—P. F. M.

[76]

Notations on back of foregoing sheet:

Net returns 1296.57

Leasers—one-half 648.28

Hospital dues, 6 persons..... 6.00

Indus. Accident, 6 persons, ½ month each 7.80

7680—John Ardession 20.00

7681—Pete Pagliero, loading car 12 1 day 5 17.00

7682—John Spehar loading car..... 8.00

7683—Matt Suttey loading car..... 8.00

7684—E. H. Walker, Secy., stock sub. 125.00

7685—Harry Daniels, 10 days..... 50.00

7686—Pete Giago, 13⅞ days..... 80.20

7687—Lawrence Mansanti, 14 days..... 80.85

7688—John Pagliero, 14 days..... 80.85
7689—Batt Tamietti, 14 days..... 83.75
7691—Frank Tamietti 80.85

$648.30

[77]

ANACONDA COPPER MINING CO.,
WASHOE SAMPLER.

Butte, Montana, March 3, 1922.

Received from Crystal Copper Co.
(Frank Tamietti.)
Address—Butte, Montana.
Mine—Goldsmith. Class—Gold & Silver.

Weights.

Sampler No.	Pounds Gross	Weights Per cent Water	Pounds Dry	Per cent Electrolytic Copper	Ounces Silver	Ounces Gold
29173	73640	4.6	70253	——	19.6	0.17

Working Charge	Price per ton	Value	Draft No.
Dollars	Dollars	Dollars	
9.45	13.14	461.56	
N. P. Ry. Freight		9.21	
		452.35	
W. A. Clark & Bro. Royalty 11½%		52.02	9385
		400.33	9386

Car No. N. P. 58763.
Zn. Pb. Insol. Fe.
Quotation and Settlement basis:

Feb. 28, 1922.

Copper	Silver	Gold	Zinc	Lead
	99⅝	$20.00		
Less 3¢	100%	90%	%	%

ANACONDA COPPER MINING CO.
WASHOE SAMPLER.
By L. R. MARGETTS,
Superintendent. [78]

Notations on back of foregoing sheet:
Net Proceeds 400.33
Leaser's one-half 200.16

Check No. 7822—John H. Bawden, loading car 9.00
Check No. 7823—Wm. Miller, loading car... 9.00
Check No. 7824—E. H. Walker, stock sub. ..125.00
Check No. 7825—Frank Tamietti..... 11.43
Check No. 7826—Batt Tamietti 11.43
Check No. 7827—Lawrence Mansanti 11.43
Check No. 7828—John Pagliero 11.43
Check No. 7830—John Giago 11.44

200.16

Filed November 2, 1923. C. R. Garlow, Clerk.
Filed Dec. 15, 1924. C. R. Garlow, Clerk. [79]

The WITNESS.—I am familiar with the handwriting of Matt Alderson, manager of the Crystal Copper Company, which appears on plaintiff's proposed exhibit "I."

Mr. McCRACKEN.—We ask to introduce that handwriting.

Mr. WALKER.—Well, we object, of course, on the ground heretofore urged, to save the record, and on the further ground that Mr. Alderson is dead, and that any transaction has with him and the parties herein is incompetent.

The COURT.—The objection is overruled. It may be admitted for the purpose suggested by the Court.

(Marked Plaintiffs' "I," received in evidence, and is as follows:) [80]

PLAINTIFFS' EXHIBIT "I."

AMERICAN SMELTING AND REFINING COMPANY.

East Helena Plant, East Helena, Mont.

Ore Settlement Sheet.

Mine—Goldsmith. Shipping Point—Butte.

Bought of Crystal Copper Company. Date—Aug. 22d, 1921.

	Assays Per Ton.	Percentage.
Gold	.30 Ounces	for 95 Per Cent @ $20.
Silver	33.5 Ounces	for 100 Per Cent @ .99¼
Lead—Per Cent		for 90 Per Cent @
Copper—Per Cent		for 100% Dry (Wet Less 1.3) @
Insoluble—Per Cent		
Iron—Per Cent		
Manganese—Per Cent		
Lime—Per Cent		
Zinc—4.0 Per Cent		Over 3 Per Cent @ 30¢
Sulphur—Per Cent		
Speiss—Per Cent		

Serial Number	Our Number	Car Number	Gross Weight	% Moisture	Number of Sacks
1715	1806	58163	108440	1.5	

Mine No.
17.

Date of B/L. Weight of
Date of arrival, Aug. 17th, 1921. Sacks
Quotations:
Silver .99¼
Lead
Copper

AMERICAN SMELTING AND REFINING CO.

By M.

Keep this statement.
Checked by W. [81]

Prices.	Debit.	Credit.
Gold—Per Ounce Less Treatment		5.70
Silver—Per Ounce 5% @ .99¼ per oz.	1.66	33.25
Lead—Per cwt. Less —— cts. per lb.		
Copper—Per lb. Less —— cts per lb.		
Insoluble—Per Unit		
Iron—Per Unit		
Manganese—Per Unit		
Lime—Per Unit		
Zinc—Per Unit	.30	
Sulphur & Speiss, treatment per ton	10.00	
Totals	11.96	38.95

Net value per ton.....26.99

Net Weight.	Per Ton.		
106813	26.99		1441.44
Freight		109.66	
War tax		3.29	
Additional freight on bullion to New York 90% of the lead @ $6.35 per ton plus increase of $6.15 per ton, effective August, 1920.			
Sampling			
Totals		112.95	1441.44
Net Proceeds			1328.49

A charge of five dollars made for sampling on all lots of ore containing less than five tons. Rates subject to change without notice, except on contracts for specified time or specified tonnage.

Notations on back of foregoing sheet:

Net Proceeds	$1328.49
23% Royalty	305.55
Net from smelter	$1022.94
Leasers—one-half	511.47

Time counted to August 15, 1921. [82]

		Deduc.	Net.	Check.
Frank Tamietti—32 days	$84.80	$6.60	$78.20	7132
Batt Tamietti—43 days	113.95	7.60	106.35	7133
John Pagliero—34 days	90.10	6.60	83.50	7134
Lawrence Monzetti—46 days	121.90	7.60	114.30	7135
Pete Giago—38 days	100.72	7.10	93.62	7136

Filed Dec. 15, 1924. C. R. Garlow, Clerk. [83]

(Testimony of Batt Tamietti.)

The WITNESS.—The ore from which I got those sample returns in exhibit "A" came from the place we were leasing on the 500 foot level, a thousand feet from the No. 1 shaft of the Goldsmith mine, from the ground we were leasing. While we were working taking out this ore we had another transaction with the defendant, and that was Mr. Alderson, the manager of the Crystal Copper Company, came with a fellow by the name of Frohock, from Boston, and they came down one morning in the winze to where we were working, and said they would be glad if we would buy some stock of the Crystal Copper Company. I said I was sure going to buy some, but I couldn't buy any stock for the other fellows, but I was going to-night to Mr. Frank Tamietti's house and we would speak there together and would decide how many shares we were going to buy. So that same evening we went to Frank Tamietti's house all together, myself and Mr. Pete Gaido, and Mr. Lawrence Monzetti and Mr. Frank Tamietti was there too in his house, and Mr. John Pagleero, and Mr. Frohock, and I understood he was from the Crystal Copper Company, and Mr. Alderson, the manager of the Crystal Copper Company, and so we five partners got together and we decided to buy five thousand shares but never had the money to pay right away, so we spoke together and agreed on the next shipment to pay so much, and decided to pay twenty-five dollars for every shipment we made from the ore, if they were satisfied, and then

(Testimony of Batt Tamietti.)

we spoke to Mr. Alderson and Mr. Alderson spoke with Mr. Frohock, and Mr. Frohock said that was satisfactory enough to the company, and he said, "You fellows have a nice showing there and I wish you would make a million dollars." And he said that was satisfactory [84] to the company, just to pay each twenty-five dollars until this one thousand shares was paid for; twenty-five dollars from each shipment, and the first car we shipped Mr. Alderson gave the money to the Crystal Copper Company, and the statement showed that we paid twenty-five dollars each for those shares. We shipped seven cars after entering into this agreement, and there was twenty-five dollars taken out of each car to pay for our stock. I only received five hundred shares, but paid for seven hundred, and haven't got the other two hundred shares yet. The stock was made out to me and each of my partners, and was signed by the Crystal Copper Company, and then below that signed by Mr. Matt Alderson, the general manager of the Crystal Copper Company. In this lead that we struck in the footwall, from the appearance of the ground I would say that lead ran about the same length as the other in the hanging, and would go from ten to fifteen feet west. Of course the back caught the south lead and caught the north lead in the same way. By the north lead I am referring to the lead in the footwall. This north lead showed up on the 500 foot level. The average width of it was two and a half to three feet. After we

(Testimony of Batt Tamietti.)

drove this cross-cut north into the footwall and discovered this lead, and after we had timbered right close to the breast, we extracted the ore on both sides of this cross-cut and we were intending to work the south lead, but the day after Mr. Alderson, the manager of the Crystal Copper Company came down to my house and told me he say, "I am sorry, Batt, but I have to cancel your lease." So I was surprised, I never said a word, but was surprised, because that was the first time after I was leasing there a long time that we [85] struck ore, and he chased me out. After a little arguing he asked me to show him where Mr. Lawrence Monzetti lived; so I showed him Mr. Monzetti's place, and he told him the same thing. Mr. Lawrence Monzetti asked him if it was for all of us and he said "yes," but then he told us, he said, "I see your car ain't complete yet; you got some ore there in the ore bin, and I don't think you have got fifty ton in there yet, and go up to-night and complete your car, and then your lease is cancelled." We went up at ten o'clock, we used to go out at ten o'clock at night to work, and so we went up there, me and Pete Gaido and Lawrence Monzetti, and tried to go to work, but Mr. Jim Delong, the engineer of the Crystal Copper Company, came over to me and said, "I am sorry, Batt, but I have got orders from Mr. Alderson to not lower you fellows down." I said, "I am not mad at you; I know you have nothing to do with this; you got your orders. We won't go down." We

(Testimony of Batt Tamietti.)

were not permitted to go down in the mine after that. Us three, Mr. Pete Gaido, myself and Mr. Lawrence Monzetti, were not permitted to go down, or do any work.

In working there, the manner in which us five partners worked, when we got down to the depth of 75 feet in the winze we decided to go on two shifts and so us three partners, me and Lawrence Monzetti and Pete Gaido went on one shift, and Mr. Frank Tamietti and John Pagleero went on another shift, and they employed a man to go with them, who went to work at day's pay; one went day shift and the other night shift. The date of the revocation was the 16th of January, 1922. [86]

Plaintiff's proposed exhibit "B" which you hand me I saw before. That is the check of Mr. Alderson, manager of the Crystal Copper Company, which he used to hand us, each partner. This is my signature on the back of Exhibit "B." I received this check.

Mr. McCRACKEN.—We offer this in evidence.

(Received in evidence without objection, marked Plaintiff's Exhibit "B," and is as follows:) [87]

PLAINTIFF'S EXHIBIT "B."

Crystal Copper Co. No. 7689.

Butte, Montana, Feb. 1, 1922.

Pay to the Order of Batt Tamietti.....$83.75

Eighty-three & 75/100.....Dollars.

CRYSTAL COPPER CO.

(9) By MATT W. ALDERSON.

To the First National Bank,
Butte, Montana, 93–2.

Endorsements on above exhibit:

This check is issued in payment for services of for bill rendered Jan. 31, 1922, or for his part Lot 5–E–B. If incorrect do not indorse but return to have matter made right. Endorsement and cashing means its acceptance in full.

(Endorsed): Batt Tamietti.
Paid 2–1–22.

Filed Nov. 2, 1923. C. R. Garlow, Clerk.

Filed Dec. 15, 1924. C. R. Garlow, Clerk. [88]

The WITNESS.—Plaintiff's proposed exhibit "D" which you show me, I saw before, and made it myself. This is a map of my idea of the way I express the winze and the way I express the lead, and the level and the bottom of the winze. It represents the 500 foot level and the winze and represents the pitch of the lead. The average pitch of the lead is 45 degrees south. The pitch of the winze is 35 degrees south. Exhibit "D" represents those pitches.

Mr. McCRACKEN.—We ask to introduce exhibit "D," which is just a rough sketch of the way it appeared to this witness.

(Document received in evidence, marked Plaintiff's Exhibit "D.")

The WITNESS.—Plaintiff's proposed exhibit "C" I have seen before. I made it myself; it represents the 500 foot level and represents the winze and represents the lead, and represents the fault

(Testimony of Batt Tamietti.)

coming from the west side and represents the stopes and the drift.

The COURT.—How does that differ from the other?

Mr. McCRACKEN.—It is a different view; one view is looking one way and the other is looking the other way. We ask to introduce this in evidence, and will bring an engineer here to show the exact measurements to the backs.

Mr. WAGNER.—We would like the record to show our objection, no foundation laid as to the correctness; it doesn't show it was made from actual measurements of any survey; that it is in any way accurate, or that it expresses any more than a general [89] idea of the witness as to his conception of what the conditions were, and further, for the reason that there are no marks upon the paper itself of identification, showing what the various lines represent, if anything.

Mr. McCRACKEN.—We will connect it up and show what it is and all the measurements.

The COURT.—On the promise to connect up to show what it is, and the measurements, the objection is overruled.

(Document received in evidence, marked Plaintiff's Exhibit "C.")

The WITNESS.—The ore was a little straighter than the winze, pitching at about 45 degrees. The winze was 75 feet deep, and was 35 degrees. In my opinion as a practical miner, pitching straighter

(Testimony of Batt Tamietti.)

it would be a less distance to the 500 foot level, and would be about 60, 61 or 62 feet from the bottom of the 500 foot level through the lead. We stoped out 20 feet up and 20 feet east. We carried this drift going east 10 feet high, and took out ore over and above this drift; took for about 85 feet, four feet all around the drift, to relieve the timbers, above the timbers. In my opinion as a practical miner this ore would continue up to the 500 foot level. I have had experience in my 20 years of mining in estimating the amount of ore in place. In breaking out a set of ground in the mine for a regular square set of timber, you have to break six feet of ground high and six feet of ground wide and six feet of ground long, and that makes about 30 or 36 tons of ore; if it is ore it makes more and if it is common rock it makes less,—37 or 38 cars of ore in a square set of ground that is stoped. In driving a drift six feet high and [90] six feet wide at the bottom, and rounded off at the top and pulling five feet of ground, would make 26 or 28 cars of rock.

Q. Now, in your opinion as a practical miner, about how many tons of ore would you say that is left over and above what you had taken out here as described in the hanging-wall side, the south side of the stope, over and above what you had taken out?

Mr. WAGNER.—We object as incompetent, irrelevant and immaterial, based on speculation and

(Testimony of Batt Tamietti.)

conjecture, not giving any facts upon which the jury may form an estimate.

The COURT.—Overruled.

Mr. WAGNER.—Exception.

A. My opinion is we left there about one thousand tons.

Q. And from the money you received from the smelter returns, from what you shipped, about what was the average value in dollars for the ore on the hanging-wall side?

Mr. WAGNER.—We object to that as incompetent, irrelevant and immaterial; the smelter returns are the best evidence. And it is not a proper proof of damage in this case.

The COURT.—Overruled.

Mr. WAGNER.—Exception.

A. Eighty-one dollars a ton.

Q. What was the average percentage of the gross value of this that your five partners received; what did the five of you, what was the average that the five of you received; what percentage out of the gross value?

A. Maybe out of the gross value it was not quite one-fourth, but maybe fifteen to seventeen dollars every one hundred dollars, that is all. [91] That is after taking the cost, including our own labor. I estimate that we could mine this one thousand tons out at an average profit to ourselves of sixteen to seventeen dollars per tone, the five of us.

I worked here in the camp over twenty years, and am able to distinguish between what is called

(Testimony of Batt Tamietti.)

waste or barren rock and ore. That which we struck in the footwall after driving that drift north was ore. This ore appeared on the 500 foot level, and in my opinion continues from the bottom of this drift through to the 500 foot level. I saw ore in the winze on the footwall side. This winze was in 35 feet before we started and the ore was started on the 500 foot level this winze right in the lead, and was two or three feet wide, and they shipped ore from that winze to a depth, I guess, of 35 feet. I don't know how it happened they quit. The ore cut off at a depth of 35 feet until was only about 6 inches, and it appeared in the bottom of the winze to go to nothing. There is a drift along the footwall vein on the 500 foot level. The north lead was driven all in the lead, drove right in on the lead going west. This ore on the footwall side on the bottom of the drift was right in the hanging-wall laying flat, with a pitch of all ore around for over 100 feet, and we sunk the winze right in the ore. The company took out the ore there on the 500 foot for over 100 feet around, and then it cut off on the east side by a fault, and cut off on the west side too.

Q. At what point from the bottom of the drift or the drift at the hanging-wall side did you drive the cross-cut north into this vein of ore in the footwall?

Mr. WAGNER.—We object to that, may it please the Court, [92] because the question assumes that they drove it north into the ore on the

(Testimony of Batt Tamietti.)

footwall; assumes that there was ore on the footwall.

The COURT.—Overruled.

Mr. WAGNER.—Exception.

A. About 20 feet east of the winze in the footwall. Drove it north from the drift, right into the footwall, and went about twenty feet. The pitch of the ore on the footwall vein was about the same pitch as the other ore we had south, going with the same distance, about 45 degrees. When we cross-cutted this vein in the footwall there was ore in the bottom of the cross-cut; it was on each side, overhead and west, and east side, all around. The lead where we cut it in the west side was two feet wide, and the east side was three feet. The ore on the 500 foot level is about two feet to two and a half feet wide.

Q. Now, as a practical miner, what in your opinion would be the number of tons of ore from the bottom of the cross-cut between these two faults, up to the 500 foot level?

Mr. WAGNER.—May it please the Court, we object on the ground and for the reason that the answer calls for an approximation of the witness, based upon an assumption that something exists which has not been shown by the evidence. The jury certainly cannot base any verdict upon assumptions. It must be upon direct evidence of the existence of a fact. The question is based upon an assumption, and the answer of the witness must necessarily be upon conjecture.

The COURT.—Overruled.

(Testimony of Batt Tamietti.)

Mr. WAGNER.—Exception.

A. My opinion, like a miner, would be something like about a thousand tons of ore.

After purchasing this stock in the Crystal Copper Company I kept myself informed as to the market value of the [93] Crystal Copper Company stock. Between the time I purchased the stock and the present time the highest market value of that stock was two dollars and five cents, or something like two dollars. I estimate that I have been damaged in the difference between twenty-five cents and two dollars on three hundred shares of stock,—or for two hundred shares of this stock which was never delivered to me. All the stock that has been paid for by the copartnership has been received by the different copartners except four hundred shares. There is thirteen hundred shares of stock issued to the copartnership under the contract of purchase.

If I found no ore in working down there I would not have received any compensation for my services. There was no agreement to pay me anything.

Cross-examination by Mr. WALKER.

The WITNESS.—There were five of us in this partnership, Mr. Pete Gaido, Frank Tamietti, Lawrence Monzetti, John Pagleero, and myself. Frank Tamietti is here in court at present, as is also Pete Gaido. Frank Tamietti is my brother. My brother Frank Tamietti did not join me in this suit as plaintiff.

I testified a while ago about how much rock was to be found in a square set. There may be thirty-six

(Testimony of Batt Tamietti.)

to thirty-eight cars of rock in a square set. If it is ore it will make more and if it is waste it will make less quantity. I would estimate from working a long time in the mine and in knowing pretty near but of course not exactly, but I could tell from that experience what it is. It would just simply be a guess. I never measured [94] and that is my opinion or my guess. If there was a body of ore above the roof here and I didn't know what the width of that vein would be, I couldn't estimate how much ore would be contained in a square set and how much waste would be contained in a square set, but would just have to guess at it. My testimony has been based upon that fact, that I would have to make a guess.

I worked there from the 26th of June, went to work, I and my partners, on the 26th of June, 1921, on night shift, and worked up until the evening of January 16, 1922, a period of seven months and sixteen days. In that time we took out ten car-loads of ore, nine car-loads containing fifty tons and one about 45 tons. For the ore that I took out in those shipments I did not receive my full portion of the net profits, all but about eleven dollars and forty-three cents, and those two hundred shares. I refused to take $11.28 that Mr. Alderson tendered, because he wanted to make me sign a paper that I didn't have to sign, and I refused to take the money. I know that my other copartners, Frank Tamietti, John Paglerro and Lawrence Monzetti took their share. They also took their share of the stock.

(Testimony of Batt Tamietti.)

Redirect Examination by Mr. McCRACKEN.

The WITNESS.—After having gotten in on our chutes and slides in this hanging-wall lead, it would take from twenty to thirty days to have stoped this ore out on the 500 foot level. It would take from thirty to forty days to have driven in the footwall vein and stoped that ground out to the 500 foot level. [95]

This $11.28 that Mr. Walker spoke about was handed to me by Mr. Alderson, and he offered to give it to me with a piece of paper that he wanted me to sign, and said, "Before I give you this check I want you to sign this." I said that I couldn't read it. He said, "You can read it, and after you read it I want you to sign this." I said, "I won't sign this, I got this in the hands of my attorney, and I have to see if it is all right." He didn't offer me anything else at that time; didn't offer me any stock. Once after that down town he offered me the stock to settle with the company, because he wanted me to settle the lawsuit. I still have the two hundred shares of stock coming, which is all paid for.

Witness excused. [96]

Mr. McCRACKEN.—Plaintiffs object to the introduction of Exhibit "J," upon the grounds and for the reasons that the same is irrelevant and immaterial and not within the issues of this case, furthermore the same does not prove or tend to prove any of the issues of this case.

The COURT.—The objection is overruled.

Exception.

(Testimony of Batt Tamietti.)

Mr. McCRACKEN.—Plaintiffs object to the introduction of Exhibit "K," upon the grounds and for the reasons that the same is irrelevant and immaterial and not within the issues of this case, furthermore the same does not prove or tend to prove any of the issues of this case, also it fails to show any consideration for any pretended release as to the 300 shares of stock claimed by Monzetti, as he received nothing more than that which he had coming at that time.

The COURT.—The objection is overruled.

Exception.

Mr. McCRACKEN.—Let the record show that plaintiffs make the same objection to exhibit "L" as plaintiffs made to exhibits "J" and "K."

The COURT.—Let the record so show and that the objection is overruled.

Exception.

Mr. McCRACKEN.—Plaintiffs make the same objection to exhibit "M" as made to exhibits "J," "K" and "L."

The COURT.—Let the record show the same objection and that the objection is overruled.

Exception.

Mr. McCRACKEN.—Plaintiffs object to the introduction of exhibit "N," upon the grounds and for the reasons that the same is irrelevant and immaterial and not within the issues of this case, furthermore the same does not prove or tend to prove any of the issues of this case, also it fails to show any consideration for any pretended release

(Testimony of W. W. Pennington.)

by Monzetti, as he received nothing more than that which he had coming at that time.

The COURT.—The objection is overruled.

Exception.

TESTIMONY OF W. W. PENNINGTON, FOR PLAINTIFFS.

W. W. PENNINGTON, called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. McCRACKEN.

The WITNESS.—My name is W. W. Pennington; I reside in Butte and am a surveyor and civil engineer.

Mr. WALKER.—We admit the qualifications of the witness as a mining and civil engineer.

The WITNESS.—I made Plaintiff's Exhibit "G" which you hand me. It represents a cross-section of the 500 foot level and the winze and vein. The winze is pitched 35 degrees, and the vein 45 degrees.

Mr. McCRACKEN.—We ask to introduce this exhibit "G" in evidence.

Mr. WALKER.—We would like to ask a few preliminary questions.

Examination by Mr. WALKER.

The WITNESS.—I personally made this exhibit "G." But did not make it from measurements which I actually took on the ground, but based it upon a hypothetical question that was handed to me. It is not made from any facts that were ac-

(Testimony of W. W. Pennington.)

tually disclosed to me from actual observation of the mine or the winze in that point or the level. I never saw the property at all.

Mr. WALKER.—We object to it as incompetent, irrelevant and immaterial, not the best evidence, and nothing to show that it is correct.

Mr. McCRACKEN.—It is to be used to illustrate a hypothetical question.

The WITNESS.—This is true and correct according to the hypothetical question propounded to me. [97]

The COURT.—I think I'll allow its admission as a basis of the hypothetical question, subject to cross-examination.

Mr. WALKER.—Exception.

(Map marked Plaintiff's Exhibit "G," received in evidence.)

The WITNESS.—Plaintiff's Proposed Exhibit "H" I saw before, and made. It represents a longitudinal section of the same mine or portion of the mine, and drawn from figures given to me for the basis of a hypothetical question propounded to me.

Mr. McCRACKEN.—We ask to have exhibit "H" admitted.

Mr. WAGNER.—We object because it is not the best evidence.

The COURT.—You state that it is offered for the basis of a hypothetical question?

Mr. McCRACKEN.—Yes.

The COURT.—The objection is overruled.

(Testimony of W. W. Pennington.)

(Paper received in evidence, marked Plaintiff's Exhibit "H.")

The WITNESS.—From this map here, assuming a winze was sunk on the 500 foot level at an angle of approximately 35 degrees, to the depth of 75 feet, and there they encounter a vein of ore going down, which they find to be at an angle of about 45 degrees, the distance from the bottom of the 75 foot winze through the vein of ore at the 500 foot level, would be 61 feet as I remember it.

Assuming that in sinking this winze they encounter a fault in the west and that appears to dip 65 degrees to the east, and in drifting it extends about 9 feet and a half west of the winze, in the bottom, and in drifting east they encounter splitting up of the vein, and this appears to dip back to the west, approximately 80 feet, figuring the basis approximately 119½ feet, from the bottom of the drift on the east to the west of the winze, [98] the distance between the two points on the 500 foot level, between these two faults as they came back, would be about 80 feet. Assuming that the plaintiffs have stoped east of the winze 20 feet, and 20 feet up, and they have carried their drift ten feet high to the east end of the drift, and have come back and taken four feet off of this ten feet, for a distance of about 85 feet or within 15 feet of the end of the drift, the width of the vein being approximately three feet, averaging about three feet, and assuming that the walls run parallel on the 500 foot level, there would be about 1103 tons of

(Testimony of W. W. Pennington.)

ore left between what is stoped out and drifted out on the 500 foot level.

Assuming a vein of ore in the footwall is approximately 100 feet long, lying between these two faults, and pitches at an angle of about 45 degrees, and averages two and a half feet to three feet, an average width of about two feet and a half, there would be about 1275 tons of ore between the bottom of vein of ore on the 500 foot level.

Witness excused. [99]

TESTIMONY OF LAWRENCE MONZETTI, FOR PLAINTIFFS.

LAWRENCE MONZETTI, one of the plaintiffs, called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. TYVAND.

The WITNESS.—My name is Lawrence Monzetti, and I am one of the parties named in the complaint as plaintiff. I have resided in this community 16 years except one year in the army. I am a quartz miner and have followed that occupation about seven years. On or about the 26th day of June, 1921, I was acquainted with a man by the name of Matt Alderson, and at that time was acquainted with the other plaintiffs in this case; had known my partners twelve or fourteen years. About that date I had transactions with the Crystal Copper Company, about getting a lease on the Goldsmith property. My five partners, Frank

(Testimony of Lawrence Monzetti.)

Tamietti, Batt Tamietti, Pete Gaido, and myself agreed to get that lease, and we got the lease from the Crystal Copper Company through Matt Alderson. He was general manager of the Crystal Copper Company.

Q. What were the terms of that lease that you entered into at the time?

Mr. WAGNER.—We object, may it please the Court, for the reason that it appears that Matt W. Alderson was agent and general manager of that company, and who negotiated the transaction, and that he is dead, and for reasons already advanced, this witness is incompetent to testify against the defendant. For the further reason that the complaint upon its face shows that the plaintiffs were operating under a license, and not under a lease and for that reason they are limited in their recovery, if any, to damages, if any, they have [100] sustained for ores actually mined, and for the further reason that the alleged contract is void under the statute of frauds, in that it is based upon oral transactions and has for its purpose the acquirement by oral transactions of an interest in mining property. For the further reason that the complaint shows upon its face that, and the evidence thus far discloses, that no partnership existed between these parties, and that they have standing in court, if at all, as individuals, and not as a mining partnership.

The COURT.—I will overrule the objection for the present.

(Testimony of Lawrence Monzetti.)

Mr. WAGNER.—Exception.

A. The terms of the lease was to go down and sink the winze on the 500 foot level of the Goldsmith mine, northwest of the shaft about 1,000 feet.

The winze already extended down 35 feet south, and under the terms of the lease the work that was to be done was to go down 15 feet more. We found some ore after we got down about 48 feet. We were to have any ore we discovered in the distance between 35 and 50 feet. Under that lease we were to get all the ore we could find, as far up as the 500 foot level, and as far east as the ore would go within the mining claim, and as far west as the claim would go. The royalties we were to pay on twenty-five to thirty dollar rock was $11.30, and and from thirty to fifty, $23.00 royalty, and from fifty to a hundred was $34.50, I think, and from one hundred to one hundred and fifty was $46.00, and from one hundred and fifty to two hundred was $56.00. The Crystal Copper Company was to furnish the equipment and the hoisting of rock and ore. We used to pump the water. The Crystal Copper Company furnished the pump. The [101] company furnished the air for the drills. The company furnished the pump, and we used to do the work. We started on that lease on the 26th day of June, 1921. The first day we went there we went down and put in the pump and connected the pipe on it, and pumped the water. The men who went down to work were myself and Mr. Pagleero and Pete Gaido. The first work we did

(Testimony of Lawrence Monzetti.)

was pumping the water. After we had the water pumped out we started to sink and clean up; started to pump because the water was standing there for quite a while and the ground was kind of loose and soft. We dug that winze as far as 75 feet. When we dug to the depth of 500 feet we were not supposed to go any further, and we notified Mr. Alderson to see if we couldn't sink any more, and he said to go ahead, and follow the ore, he said, as far as it goes, as far as went to, as far as the ore goes. We found ore above that, found the ore about 48 feet deep, that is from the top of the winze down 48 feet we found ore. Mr. Alderson said to extend the ore down as far as went on the ore. The ore went down as far as 75 feet. The conditions of the extension of the lease when we had the 500 foot down, as far as we could go, was the same as before, the same terms and conditions, that is, we were to have the ore from the depth where we reached up to the 500 foot level, up to the east end of the claim and to the west end of it, if it should go there. After we got to the depth of 75 feet we struck a fault; we then notified Mr. Alderson that it wouldn't pay to sink any more, and he said to sink a sump enough to hold the water before the two shifts; and then we started drifting on the ore, and we drifted 100 feet east, and about 9 or 10 feet west; the ore was about 14 feet wide some places there at the winze, and about 20 feet east of the winze it was about 3½ or 4 feet, the average width [102] of the vein from the winze

(Testimony of Lawrence Monzetti.)

east to about 100 feet was from about three to three and a half feet. When we got about 100 feet from the winze we found it split up. Where the ore was split up there about 100 feet east of the winze it was split with a slant west about 80 degrees. When we were working in the winze we struck the ore in the east corner. The ore in the winze as we went down was tipping about 65 degrees west. There was a fault on the west side; it was dipping east about 65 degrees. The winze was sunk down at an angle of 35 degrees; the vein dipped, at an angle of about 45 degrees, dipping south. The ore that we found in the winze we shipped; also shipped the ore that we took out in the drift, under the name of the Crystal Copper Company, and got returns on that ore; shipped ten cars, and got returns on all of it. I don't know whether or not Mr. Batt Tamietti got any returns; don't know anything about any returns he got. We timbered the drift. We cross-cutted north in the footwall lead. We stoped north or drifted the cross-cut north under the same conditions as before, and under the same terms, cross-cutted north about 35 feet, and struck a lead there about two feet and a half wide. This lead showed up at the top of the cross-cut; the vein was running south—well, the vein was running east and west, where we cross-cutted north. We found a vein on the east side of the cross-cut; also on the south side of the cross-cut, or the west side of the cross-cut, both sides of the shaft, and found it at the bottom

(Testimony of Lawrence Monzetti.)

of the cross-cut; it was about two feet wide at the west side of the cross-cut, and about two feet and a half wide on the east side of the cross-cut. It was about the same at the top of the cross-cut. We took samples from the cross-cut, took one sample from [103] the vein, and sent them out to be assayed; gave them to the foreman. Saw the return of that sample after. Mr. McCarthy assayed the sample that we sent up. Mr. Frank Shields had the sampling done for us. He was foreman of the Crystal Copper Company. The Crystal Copper Company paid for the assaying of the sample. We had samples taken of the work we done there every day or every other day.

In the drift we timbered and put in chutes and slides alongs the stopes. The ore showed up all along the top of the drift. We stoped out ore in our lead or vein; stoped out in the drift about 20 feet up and 20 feet along. Three of us were working on each shift. We had another man working besides the five partners, a man by the name of John Ardenson; and paid him wages. The partners paid him, the five of us. We started to work two shifts around the middle of August, and paid Mr. Ardenson about five dollars and a quarter. The average wage scale in this camp at that time was four dollars seventy-five cents a day. I did not receive any wages when I worked up there. After we had been working there for a while we did other work besides what I have mentioned.

(Testimony of Lawrence Monzetti.)

We cross-cutted north in the footwall lead, and those other things I told you.

We worked a little over two months I guess in the winze and drift under the 500 foot level, under the lease in this case, before we shipped any ore. We were doing dead work. Nobody else worked in that winze and drift in the place we were working, besides our five partners in the time between the 26th day of June, 1921, and the 16th day of January, 1922, except the man we hired [104] there. Nobody else besides my partners took out any ore in that particular place, that is in the drift and the hanging-wall vein and in the footwall vein. We shipped the first carload of ore around in August some time. In the month of October we had dealings with Mr. Alderson, the manager of the Crystal Copper Company about some stock, or with the Crystal Copper Company. The transaction was to buy some stock from the Crystal Copper Company, and at that time there was present Mr. Alderson and Mr. Frohock. Those present were me and Frank Tamietti and Pete Gaido and Mr. Alderson and Mr. Frohock. The transaction was to buy some stock from the Crystal Copper Company. We agreed to buy five thousand shares between the five partners, and the condition was to pay twenty-five cents a share, paying twenty-five dollars on each shipment of ore; that is, twenty-five dollars on each partner's share, making $125.00 on each car to be applied on the purchase price. We shipped seven cars thereafter, and received

(Testimony of Lawrence Monzetti.)

seven hundred shares of stock. In the month of January, 1922, about the 16th, I saw Mr. Alderson. He came down to my house and told me that the lease was cancelled. Frank Tamietti came with him. He said that we could go up and finish the car, and then it was all off. I went out to the mine that night and tried to go to work but they wouldn't let me go down. The engineer wouldn't let me go down to work. He said he had orders from Mr. Alderson not to lower us down. I have been willing and ready to go to work and carry on my lease and was at that time. At the time I tried to go down Frank Tamietti and Pete Gaido and myself were there,—Batt Tamietti. I have been willing to carry on the work there and extract the rest of the ore we had in the place on the hanging-wall lead and footwall lead, but have not extracted any ore since [105] that time; haven't extracted any ore after the 16th of January, 1922, because they closed us out. The walls in the hanging-wall lead were parallel along the whole length from the winze to the east end of the drift. In my experience as a miner I would say that the vein we had exposed along the hanging-wall lead from the winze to the east end of the drift, about 100 feet, extended up to the 500 foot level.

Q. And in your experience as a practical miner what would you say as to the values in that particular vein, whether they would continue or not?

Mr. WALKER.—We object to that as calling for a conclusion of the witness and for conjecture

(Testimony of Lawrence Monzetti.)

and speculation of an interested party to the case.

The COURT.—Well, let him state for whatever it is worth. Of course, this can be covered by the instructions.

Mr. WALKER.—Exception.

A. Yes, sir, they would continue.

Of course, they may sometimes be richer and sometimes a lower grade. In my opinion the values in the ore would continue about the same up to the 500 level, as they had been in the drift where we had drifted and shipped the ore. It was a two compartment winze that was sunk down from the 500 foot level, about twelve feet by six feet; the twelve feet was east and west and six feet high. [106]

Cross-examination by Mr. WALKER.

The WITNESS.—I know what Plaintiff's Exhibit "A" is which you have handed me, and those are the returns from the smelter that Mr. Batt Tamietti had in his possession. I know what they are and understand them, but cannot read much. I understand them by the figures and my partner told me what it was. I know that these are returns from the smelter for ores I and my partner shipped, and know that it was on these that they made settlements with me as shown on the back here,—Mr. Alderson's writing. I write a little bit; write my name and know it when I see it. I know what Exhibit "J" is, which you have shown me and saw it before. I saw the signature endorsed on the back and that is my writing when I

(Testimony of Lawrence Monzetti.)

sold to Mr. Alderson. This is a check dated March 4, 1922, for $100.00 payable to me, and signed by Matt W. Alderson personally. I received 700 shares of stock as a result of this mining operation there, and was entitled to one thousand shares. I got all I paid for. Up to the time the lease was cancelled I had only paid for seven hundred shares, and that I obtained.

On the 16th of January Mr. Alderson told me that the lease was cancelled. I had moneys coming at that time as a result of ores I had shipped to the smelter, and received the moneys that was due me for ores I had shipped. At the time the lease was cancelled and right afterwards, I was paid for everything I had taken out and shipped, for every thing I had mined and shipped. I still claim my right for 300 shares of stock on our agreement, previous to the time the lease was cancelled. I was paid for it. There was no shipment made after January [107] 16th that I didn't get the entire share of my proceeds from. We were not supposed to pay for the stock except by the shipments. Everything I paid for in the way of stock I received. What I want to say is that I could have paid for the additional three hundred shares of stock if I had been permitted to continue mining.

I have got an idea how much rock there is in a square set, but might be mistaken in a few cars. Whatever I would testify to would be just by guesswork. When I say that this ore ran up to 500, that is my own knowledge, because I saw it on

(Testimony of Lawrence Monzetti.)

the 500; saw the ore all up through that; could see all the way; east of the winze. Didn't see the ore east of the winze where there wasn't any winze. We went east 100 feet and ran into a fault. I could look up to the level on the 500 but could not see the ore through the ground; could see it on the level up above. Nobody could see the ore that was between the level and the 75-foot level of the winze. You could see the ore up to the level from the bottom of the winze—I am guessing at what was between the 500-foot level and the bottom of the winze. Nobody can see through the ground. Therefore it would be my guess about it. But when I saw the vein up on the other level it must come up, it had come up as it was the same vein. It went up on the hanging-wall and footwall both. We sank the winze on the footwall. We drove a drift 35 feet and by reason of that fact I tell the jury I could tell what was in the footwall up on the level; the winze was up on the next level. I could see the winze right through [108] because it showed up there, between the 35 foot drift and the 500 foot level. We sank the winze on the same vein, and we could see it. We could not see the ground between the 500 foot level and the 35 foot drift, but we could see the vein along the winze, and it showed right up. After we got beyond where we had drifted we couldn't see unless we put in another round of holes. I want to tell about the ore where I actually saw it, namely, on the 500 foot level and on the bottom in the cross-cut, the

(Testimony of Lawrence Monzetti.)

35 foot cross-cut. The balance of it I am simply guessing at; guessing about the quantity and the quality.

We shipped a carload of ore from the footwall; sank the winze; after that did not ship any ore from the footwall; did not explore the footwall after that. We didn't do anything further with the cross-cut because they cancelled the lease. We were shipping ore from August until January. We didn't do any more exploration work in the footwall from August until January, because we had something else to do. We were trying to drift before we did that. If the ore was richer on the footwall than the hanging-wall, we would not have taken the footwall ore first. We couldn't do that. We had to follow the hanging-wall lead first, before we could go on the footwall lead. We knew what the values of the footwall were, because we took samples there. I saw the ore assayed; didn't see the man assaying that rock but saw the returns; didn't follow the sample from the time I took it out of the vein to the assay office; and don't know whether the sample which was assayed was the sample which was taken from the vein or not. [109]

This is my signature on Defendant's Exhibit "N"; this is my signature on the back of Defendant's Exhibit "J." That is my name on the front; this is my name on the front of Defendant's Exhibit "L." That is my name on the back; this is my name on Defendant's Exhibit "K"; that is my

(Testimony of W. R. Richards.)

signature on Defendant's Exhibit "M," and that is my name on the front.

Witness excused. [110]

TESTIMONY OF W. R. RICHARDS, FOR PLAINTIFFS.

W. R. RICHARDS, called as a witness on behalf of plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. TYVAND.

The WITNESS.—My name is W. R. Richards; I reside in Walkerville, have resided in this community since '89, and am a miner. I am familiar with what is known as the Goldsmith mine, and knew where it was at on the 26th day of June, 1921. At that time I was somewhat familiar with what is known as the 500 foot level in the mine, and with the winze about one thousand feet northwest of the main shaft of the 500 foot level. Was familiar with the level known as the 500 foot level. I was down in the winze at about that place, that is about 35 feet deep, sunk on the 500 foot level, at an angle of about 35 degrees. I am somewhat familiar with the vein that was in the hanging-wall there. I continued that winze down, as I understood, from about 25 feet on the footwall vein, but I didn't cross-cut to the hanging-wall vein. I was not down there at any time after the leasers and the plaintiffs in this case had been working down there. I was there before the leasers at the present time

(Testimony of W. R. Richards.)

worked there, that is, the plaintiffs in this case. There was a footwall lead on the 500 foot level in the drift, there were two veins, there was a split in the vein. There were two veins; there was a cross-cut driven from the 500 foot level north and encountered the hanging-wall vein, which carried high value, and then the footwall vein was about four or five feet wide, and had value in spots. The hanging-well vein [111] showed up on the 500 foot level, that is the 500 foot level, the bottom of the 500 foot level. I don't know how far it went up, never prospected above it. There was a faulted condition come in there, and in fact I never had an opportunity. I shipped ore from the footwall lead, shipped somewhere about a carload. Some cars are larger than others. That was shipped to East Helena, and the amount they gave was somewhere around about seventy dollars a ton, and we had to do with it. I didn't ship any ore from the hanging-wall lead.

Cross-examination by Mr. WAGNER.

The WITNESS.—I was working under a contract myself, on the 500 foot level. The winze that has been testified to in this case was the winze that I myself sunk; helped to sink the winze some 25 feet. That winze was sunk by me in endeavoring to get out the ores under my contract. We didn't sink that winze deeper, because we struck too much ore, and were making too much money. We started on the contract we had in March and quit in June. I just fixed it up in pretty good shape, and then

(Testimony of W. R. Richards.)

it was taken away from me. We quit in June and started in March; sank the winze in March. The condition at the bottom of the winze, with respect to any ore being in sight, was that it was a mere prospect as far as I was concerned; I couldn't see through the ground. I had ore in sight in the bottom; and paying ore, at the 25 foot level,—above the 500 foot level, on the footwall vein, we had ore there. I just told you why I couldn't [112] ship it. I was in partnership with Tom Melville, Constant Melville and Frank Tamietti, working there. We did not throw up the lease because we couldn't make it pay. I was thrown out of the lease. I have got use for everything that is right. I didn't bring any action for damages; couldn't afford to.

Witness excused. [113]

TESTIMONY OF PETER GIADO, FOR PLAINTIFFS.

PETER GIADO, one of the plaintiffs, called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. TYVAND.

The WITNESS.—My name is Pete Giado. I am a miner, and have been following mining for 15 or 16 years in Butte. I am one of the plaintiffs in this case. On or about the 26th day of June, 1921, I was acquainted with Matt Alderson, and at that time was acquainted with the other plaintiffs in this case. On that day I had business

(Testimony of Peter Giado.)

transaction with Mr. Alderson, as manager of the Crystal Copper Company.

Q. What was the transaction?

Mr. WAGNER.—If the Court please, may we understand that the same objection we have heretofore made goes to this testimony as well.

The COURT.—That will be the understanding, that the objection continued throughout the case to all evidence of this character.

The WITNESS.—On the 500 foot level we know of a place that was to be leased, and Batt Taimetti and John Pagleero and Frank Tamietti and myself, we know the conditions and we would agree to go down and sink this winze on the 500 foot level, which was about one thousand feet northwest of the main shaft, and we were to sink that winze and go east and west as far as the ore would go. The agreement was to sink the winze to complete fifty feet. The royalties were to be so much per cent of the ore. The Crystal Copper Company was to furnish the tools and supplies, powder and timber and air, and to hoist [114] the ore and waste. We commenced working on that lease the 26th of June, 1921, and those going to work there were me and Mr. Frank Tamietti and Lawrence Monzetti. We went up and the first work we did was to establish the pump and to connect the pipe. The winze had 14 or 15 feet of water and we started to pump the water and when we got that out there was a few carloads to pump out, and then we got timbers and fixed the winze and sank. Sank it

(Testimony of Peter Giado.)

75 feet, complete with a sump. We put it about 50 feet down on the hanging-wall lead, and we supposed it was good ore, and had Mr. Alderson, the general manager of the Crystal Copper Company come down and look at it, and he said it was looking fine, and then our partners asked for permission to sink some more, and Mr. Alderson said, "Boys, sure, go ahead and sink the winze as far as the ore goes, and the more you sink the more we are going to have ore up above." We were to have extension of the lease on the same terms and conditions, and with the same royalties. The same way with the ore extending west and east and north and south. We followed the ore down the winze 70 feet, and it then happened that a fault was coming in from the west end, and cut all the ore out in the bottom of the winze. As soon as we struck this fault we went in the office to Mr. Alderson, and told him we struck the fault, and he came down the next day and looked, and there was five partners at that time working, Batt Tamietti and Frank Tamietti, and Lawrence Monzetti and John Pagleero and myself, and he said it didn't pay to sink any more; Mr. Alderson say, "No, boys, you might as well not. We need some ore, go ahead and go east and west [115] and get all the ore you can as quick as you can." We did drifting at the time; we drifted east about 100 feet and then a fault cut the ore off. The ore was cut off at the east end because it was dipping west pretty straight, cut about plumb, about 80 degrees or something like

(Testimony of Peter Giado.)

that. We shipped the ore we found in the winze and in the drift; think we started to ship in August; think we had shipped some time in July and got the return in August.

The vein going east along the drift, south or far to the east side of the winze, there was a big body of ore some places 14 or 15 feet in the bottom of the winze, and the back of the hanging-wall lead. Further east in the winze it would get a little narrow. It was about three and a half or four feet wide on the average all the way through. We stoped out some along the drift; I think we stoped about 20 feet up, and 20 or 25 feet along at the hanging-wall lead, on the east end of the drift, the east side of the winze; at the west of the drift we took some out close to the fault, and the bottom of the winze was about ten feet or nine feet in the fault, went up in the vein, and we followed the fault and took the ore out about 14 feet on the west end.

We did timbering all over. At the east end when we started to stope we put in about three set and sealed it up and got the waste out, the way we were supposed to do. When we sunk the winze and struck the fault 25 feet we were of the opinion the ore didn't go any deeper; it was a regular fault that was coming from the west, and we thought that was the end of the ore. We thought there was no more ore, and that's [116] the reason we didn't go any deeper. When we started drifting east we found there was ore below the drift

(Testimony of Peter Giado.)

on the bottom; of course I don't know how far on the bottom the ore go; we always have ore on the bottom of the winze; we take out all kind before we put in the timber. The hanging-wall vein was at an angle of about 45 or 50 degrees, but I never had time to find out exactly, just my idea of it. The winze was at an angle of about 35 or 40 degrees.

Besides what I have already stated we also drove a cross-cut on the north on the footwall lead. On the footwall we ran in about 25 or 30 feet, and it happened that I was first one that blasted the first round, and I tapped the lead. That drift was cut about 45 feet straight north from the hanging-wall lead,—from the winze. I never measured how far from the winze east we cross-cutted north, but about 35 or 40 feet; am not so sure of that, never measured it. When we got into the footwall lead we went through it; it just happened we got the lead and we got one assay sampled. The lead to the west was about three feet wide and on the east end it would show about two feet; we were not clear through. The vein showed up at the top and bottom and in the east and west side of the drift, or at the cross-cut.

We commenced shipping ore in August, but am not sure of the date. I saw Plaintiff's Exhibit "A" which you show me, before. Batt Tamietti is a pretty square man and he always looked after those things. Plaintiff's Exhibit "A" is a statement return of the smelter on the ore we shipped to East Helena. We got the ore from the Goldsmith

(Testimony of Peter Giado.)

mine, and this is from the ore we found in the bottom of the winze and along the winze below the 500 foot level. [117]

In my opinion as a practical miner I would say the ore we discovered along the drift extended up to the 500 foot level. The walls of the vein were parallel. The trend of the vein throughout along the line was parallel. As a practical miner in my opinion I would say that the values of the ore we found along the drift that we shipped to the smelter would continue up in the way I referred, up to the 500 foot level; the ore was right up to the 500 foot level; of course we cannot go in the ground, but it was up to the 500 foot level, and in my opinion the value would be about the same, some a little higher and some a little lower, but it is pretty hard to tell that. It was pay rock all the way up.

In the month of October we had a stock transaction with Mr. Alderson, manager of the Crystal Copper Company. One day we were working down in the mine and Batt Taimetti and my other partners were there, and Mr. Alderson the general manager of the Crystal Copper Company and a director from Boston, if I am not mistaken, Mr. Frohock,came down in the place and Mr. Alderson said, "This man wants to see this place look nice," and it was in good shape, and he said, "Boys, it is in fine shape," and he said, "This is the one place I like to come down to see the ore and pay rock," and it happened that Mr. Frohock, he said, "Well, boys, do everything fine and I hope you make a

(Testimony of Peter Giado.)

million dollars, and the company makes something," and he said, "Boys, if you are willing to buy some stock from the company, it would be nice and better for us, and the stock is going up soon." [118] And Batt Tamietti, he told us, we can see about that; of course we cannot buy any stock until we see the other partners some place and we talk over about it. And so then we met down at Frank Tamietti's house and we had a talk about buying stock there. We agreed to buy five thousand shares, one thousand each for the five partners. We had no money to buy at the present time, and we thought if the company give us a chance to pay at twenty-five dollars every car we shipped. We shipped after that seven cars, and there was twenty-five dollars on each car deducted from the shipment that we made, and we got a certificate for 500 shares. The certificate was in my name and the name of the Crystal Copper Company. I received 500 shares. I paid for 300 more but didn't receive that stock. Received five hundred shares from five car shipments. The other two cars that were shipped I didn't receive any shares of stock for, but there were deductions made from my checks on each car. I have not received the shares of stock.

On the 16th of January, 1922, I did not see Mr. Alderson but Batt Tamietti and Lawrence Monzetti met down at Batt Tamietti's house and he told me Mr. Alderson was down and told Lawrence Monzetti the lease was cancelled on the 16th

(Testimony of Peter Giado.)

day of January, 1922. On that day he went up to the Goldsmith mine to go to work, three of us, Batt Tamietti, Lawrence Monzetti and myself, and Batt Tamietti met the engineer from the Goldsmith mine and he told Batt, "I am sorry, but I can't lower you down any more, you fellows," he said, "that is the orders from the Crystal Copper Company and Mr. Alderson." We tried to go down to work that night but it was no use. I told the engineer it was all [119] right "if you got the order." I was willing and ready to keep on with the lease, to keep on with the work, and have been ever since.

At the present time four of us men worked in the winze and drift below the 500 foot level, and after we got through sinking the winze there were five, Frank Tamietti, came to work then, but he was sick at first. After we sank the winze and got through with it us five partners were working together and nobody else, but after that there was a boy working for us, John Ardenson was working there for us five partners, and we paid him five dollars and twenty-five cents a day.

In my opinion it would take about thirty days to have stoped out the ore left in the hanging-wall lead at the time were ejected from the lease on January 16, 1922, with the six of us working there. In the footwall lead it might give us more trouble, but in my opinion it would take about forty days to have stoped out the ore there, or forty-five days, six men working. There was nobody else working

(Testimony of Peter Giado.)

down in the drift and in the cross-cut and in the winze besides us five partners and Mr. Ardenson when we were working there. We were the only ones working there, the only ones taking out ore.

Cross-examination by Mr. WALKER.

The WITNESS.—I testified that I had 300 shares coming, and am sure of that. I testified in this same case in this same court formerly.

Q. I will ask you if at that time you were not asked this question and if you didn't make this answer: "Q. And you got one hundred shares for each carload. A. Yes, we have [120] one hundred shares for each car we shipped. Q. And the other two cars that had been shipped, did you or not pay the twenty-five dollars there? A. Yes, we paid twenty-five dollars there, and we never had a certificate on that 200 shares we paid for; the company had it in hand." Now, which is correct; your testimony then at the last trial or your testimony now?

A. Just the same; I had 300 shares paid for and I didn't receive.

I testified at the last trial I had 200 coming. I paid for 300 shares. I suppose the receipt is 200 shares, but I got 300 shares coming; had 300 shares coming. I might be mistaken when I testified at the last trial I had 200 coming, and I don't

(Testimony of Peter Giado.)

know for sure if it was 300 shares. I heard Batt Tamietti testify. I have the same amount of shares coming that he has. If he testified he had 200 shares coming I still maintain that I have 300 shares coming. I got 700 shares altogether, and paid for 700 shares. I got 500 and still have 300 more coming, which is paid for and I didn't get. I did not pay for more stock than Batt Tamietti; paid for just the same amount, and was entitled to the same amount that Batt got.

When I started working in the winze it had been sunk to a depth of 35 feet. That is the same winze Mr. Richards testified he had worked in. We started in to work where he left off, and sank about 12 or 14 feet before encountering ore; encountered ore when we sank about 45 or 50 feet. There was ore where Richards left off on both sides of the winze, the [121] footwall. Of course when we started it was a little small streak in the bottom of the footwall but it wasn't paying rock, just a streak, just a lead and not pay rock. I heard Mr. Richards testify that he had pay ore there when he left.

When this lease was cancelled did not offer me 200 shares of the stock that I claimed I paid for; didn't see Mr. Alderson but he told Batt Tamietti to offer that stock; I didn't see him but Batt told me. I refused to take it. Mr. Alderson offered the stock to Batt for me and Lawrence Monzetti. I didn't take it because I had no reason to take it;

(Testimony of Peter Giado.)

didn't want it. We didn't want it because we had been thrown out of the lease.

Redirect Examination by Mr. TYVAND.

The WITNESS.—The reason why I refused to accept the stock was that Mr. Alderson wanted me to dismiss this suit before he delivered this stock to me.

Witness excused. [122]

TESTIMONY OF HARRISON E. CLEMENT, FOR PLAINTIFFS.

HARRISON E. CLEMENT, called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. McCRACKEN.

The WITNESS.—I am general manager of the Crystal Copper Company and have been such since the 1st of May, 1923. I took Mr. Alderson's place at that time. You served a *subpoena duces tecum* on the foreman of the mine the other day, but agreed to excuse him if I should get everything you demanded if possible.

Q. Have you any other settlement sheets from the smelter that have been shipped from the winze on the 500 foot level, involving the ore that is in controversy here in this case, since August 22, 1921, to the present date, that has not been introduced in evidence?

A. Do you mean of the ore that has already been mined?

(Testimony of Harrison E. Clement.)

Q. That has already been mined.

A. There are six settlement sheets from the ore in controversy; that is on these plaintiffs, the ore taken out by these plaintiffs.

Q. I will ask you to examine Plaintiff's Exhibit "A" and Plaintiff's Exhibit "E," together with the settlement sheets which you offered, and ask if they are here,—any of them duplicates of the ones already in evidence.

A. You have two duplicates in your exhibits here, two settlements of November 31st.

Q. I will ask you if plaintiff's proposed exhibit "O" is not a duplicate of that which is already in evidence?

The COURT.—I think you better look these papers over some time during the noon hour and find out what you want. [123]

Mr.McCRACKEN.—Very well, your Honor, but that will complete our case, as far as I know.

The COURT.—That is all you want to put in.

Mr. McCRACKEN.—Yes.

Mr. WAGNER.—I'll state, may it please the Court, I think we are in a position to put on a little evidence, if it is agreeable to the plaintiffs, in order to expedite matters, and let them re-open again at two o'clock.

The COURT.—Very well, we will do that.

Mr. WALKER.—If the Court please, we now offer in evidence Defendant's Exhibits "J," "K," "L," "M," and "N."

(Documents received in evidence, marked Defendant's Exhibits "J," "K," "L," "M," and "N," and are as follows:) [124]

DEFENDANT'S EXHIBIT "J."

No. 53.

Butte, Montana, March 4, 1922.

Pay to the order of Lawrence Monsanti ..$100.00
One Hundred and no/100 .....Dollars.
To W. A. Clark & Brother,
93–1 Bankers 93–1,
Butte, Montana.

MATT W. ALDERSON.

(Endorsed across face:)

W. A. Clark & Brothers, Bankers.
Paid.
Mar–6–1922.
Butte, Montana.

Endorsements on back of above exhibit:
Lawrence Mansanti. Paid.

Filed Dec. 15, 1924. C. R. Garlow, Clerk. [125]

DEFENDANT'S EXHIBIT "K."

Butte, Mont. Mar. 4, 1922.

Received of Matt W. Alderson One Hundred Dollars in full for my 200 shares of stock in the Crystal Copper Co. and for any real or implied right which I may have for the purchase of 300 shares additional.

LAWRENCE MOZETTI.

Witness.

Filed Dec. 15, 1924. C. R. Garlow, Clerk. [126]

DEFENDANT'S EXHIBIT "L."

Crystal Copper Co. No. 7827.

Butte, Montana, March 4, 1922.

Pay to the order of Lawrence Monsanti ..$11.43

Eleven & 43/100. .....Dollars.

CRYSTAL COPPER CO.

(9) By MATT W. ALDERSON.

To

The First National Bank,

Butte, Montana 93–2.

Endorsements on back of above exhibit:

This check is issued in payment for services of for bill rendered to Mar. 4, 1922, for his part Car 58763. If incorrect do not endorse but return to have matter made right. Endorsement and cashing means its acceptance in full.

LAWRENCE MANSANTI.

Paid: 3–6–22.

Filed Dec. 15, 1924. C. R. Garlow, Clerk. [127]

DEFENDANT'S EXHIBIT "M."

Crystal Copper Co. No. 7687.

Butte, Montana, Feb–1, 1922.

Pay to the order of Lawrence Mansanti ..$80.85

Eighty & 85/100 .....Dollars.

CRYSTAL COPPER CO.

(9) By MATT W. ALDERSON.

To

The First National Bank,

Butte, Montana, 93–2.

Endorsements on back of above exhibit:

This check is issued in payment for services or for

bill rendered to Jan. 31, 1922, or for his part Lot 5–E, B. If incorrect do not endorse but return to have matter made right. Endorsement and cashing means its acceptance in full.

LAWRENCE MANSANTI.

Paid 2–1–22:

Filed Dec. 15, 1924. C. R. Garlow, Clerk. [128]

DEFENDANT'S EXHIBIT "N."

Butte, Montana, March 4th, 1922.

Received of the Crystal Copper Company, a corporation, of Butte, Montana, the sum of Eleven & 43/100 Dollars, being my proportionate share in all ores shipped in the name of the Crystal Copper Company, a corporation, by me, as a copartner with others with whom I was interested in a certain lease.

This payment is acknowledged by me as full and complete settlement and satisfaction of any and all claim or claims that I may have against the said Crystal Copper Company, and as full and complete satisfaction of any and all demands that I may have against the Crystal Copper Company, the corporation aforesaid.

LAWRENCE MOZETTI.

Witness:

MATT W. ALDERSON.

Filed Dec. 15, 1924. C. R. Garlow, Clerk. [129]

TESTIMONY OF JOSEPH V. FLAHERTY, FOR DEFENDANT.

JOSEPH V. FLAHERTY, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. WAGNER.

The WITNESS.—I am official court stenographer of the Second Judicial District Court, and am the same J. V. Flaherty who took the stenographic notes of the testimony given at the former trial in the case entitled Lawrence Monzzetti, Pete Gaido and Batt Tamietti, plaintiffs, versus Crystal Copper Company a corporation, defendant, No. 362, being the case and action now on trial, which trial was had on Friday, November 2d, 1923. At that time I made stenographic notes of the testimony and proceedings given at the trial. The document which you hand me entitled in the District Court of the United States, in and for the District of Montana, No. 362, is the transcript of the testimony given at that trial and is true and correct as far as I am able to make it, transcribed by me personally from shorthand into longhand. Pages 54 to 64 is the testimony of Matt W. Alderson given at that trial, and those pages contain all of the testimony given by Mr. Alderson at the former trial. He was called as a witness for the plaintiffs.

Mr. WAGNER.—We now offer in evidence the testimony given by Matt W. Alderson, who is now

(Testimony of Joseph V. Flaherty.)

deceased, given at the former trial when he appeared as a witness.

Mr. WALKER.—I suppose the record will show that Mr. Alderson is dead and buried.

The COURT.—There is testimony here to that effect from two or three witnesses.

(Testimony of Matt W. Alderson given at former trial, marked Defendant's Exhibit "P," and read in evidence as follows:) [130]

DEFENDANT'S EXHIBIT "P."

MATT W. ALDERSON, called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. McCRACKEN.

Q. State your name, please.

A. Matt W. Alderson.

Q. Where were you employed during the year 1921?

A. At the Goldsmith mine in Walkerville.

Q. And what Company owned the Goldsmith mine or was working the Goldsmith mine at that time? A. Crystal Copper Company.

Q. And what position did you hold with the Crystal Copper Company?

A. I was General Manager.

Q. General manager and superintendent?

A. Yes, sir.

Q. I hand you Plaintiff's Exhibit "A," and ask you to state whose writing that is on the back of those smelter returns, if you know?

A. They are all in my writing.

Q. The money was divided up as it purports to be, between the different leasers on this lease?

A. Yes, sir.

Q. Have you any other smelter returns with you that the plaintiffs and their copartners shipped from this lease? A. Yes, sir.

Q. Will you produce them, please? [131]

Mr. McCRACKEN.—I ask that these be marked as exhibits.

(Marked "E.") I wish to introduce these.

Mr. WALKER.—We have no objection.

Q. The writing on the back is your writing, is it, Mr. Alderson?

A. It is, in every instance but one.

Q. And which one is that?

A. The last one.

Q. Have you the original lease from the Ellingwoods as Trustee, and Paul Gow? A. No, sir.

Q. Have you the original assignment from Paul Gow to the Crystal Copper Company? A. No.

Q. Do you know where they are?

A. I presume they are in possession of the Crystal Copper Company.

Q. Did you ever see the original lease?

A. Yes, sir.

Q. You say they are in possession of the Crystal Copper Company, do you mean at their office in the east some place?

A. No, sir, they are on file in the office—I am not sure I think they are just copies in Butte. The others are on file in Boston perhaps.

Mr. McCRACKEN.—I ask that these be marked. (Marked "F.")

Q. I hand you Plaintiff's Exhibit "F," what purports to be a copy of the lease from C. W. Ellingwood, Carter E. Ellingwood, and J. K. Heslet, and P. H. Gow, also purports to be a copy of the assignment from P. H. Gow to Crystal Copper Company. I will ask you to examine it and state whether or not they are true and [132] correct copies of lease and assignment.

Mr. FRANK WALKER.—To which we object as incompetent, irrelevant and immaterial.

The COURT.—What is the purpose of this?

Mr. McCRACKEN.—To show there is nothing in the original lease and assignment to stop the Crystal Copper Company as lessee from subleasing or assigning any part of their rights under the lease.

The COURT.—What if there was? It has nothing to do between these parties; it might have between Mr. Gow. Sustained.

Q. Have you the two hundred shares of Crystal Copper Company's stock in your possession that belongs to one of the plaintiffs, Batt Tamietti?

Mr. FRANK WALKER.—To which we object as incompetent, irrelevant and immaterial; no bearing on the issues in this case at all.

Mr. McCRACKEN.—That is one of the parts of the damages, they are withholding the stock.

The COURT.—Overruled.

Exception.

A. I don't know as I fully understand the question or the purport of it.

The COURT.—Read the question.

Q. (Question read.)

A. No, sir, I have not.

Q. Do you know where those two hundred shares are? A. I sold them. [133]

Q. You sold them? A. Yes, sir.

Q. You never delivered them?

A. I offered to deliver them and they wouldn't accept them. I offered them to the lawyers, the attorneys.

Q. There was a string tied to that offer, was there not? A. No, sir.

Q. We had to dismiss the suit then pending?

A. Certainly.

Q. And at the time you made the offer, state who those lawyers were you made the offer to.

A. To the gentlemen here, the plaintiffs' attorneys.

Q. Mr. Tyvand and myself? A. Yes, sir.

Q. And at that time you had two hundred shares of stock belonging to the plaintiff Pete Gaido, did you not?

A. I had two hundred shares belonging to Pete Gaido and two to Batt Tamietti, yes, sir.

Q. And you told us you would not deliver them unless we dismissed a certain suit then pending?

A. Of course not.

Q. And you made full settlement on nine cars of ore shipped by these plaintiffs and their copartners,

you paid them all the interest they had coming on the cars?

A. No, sir, there is $11.43 due Batt Tamietti and $11.42 due to Pete Gaido.

Q. That is on the ten cars? [134]

A. No, sir, the nine cars.

Q. Didn't they ship ten cars altogether?

A. Nine cars.

Q. I hand you Plaintiff's Exhibit "E" and Plaintiff's Exhibit "A," and state whether or not if those are not the correct settlement sheet from the smelter on all ores shipped that these plaintiffs mined at the Goldsmith mine in this winze and stope and drift from there?

A. These are not in order, ond it will take me a little time to check them.

The COURT.—What is the object?

Mr. McCRACKEN.—To show there is ten cars shipped. He has given me five more and we introduced five.

The WITNESS.—I beg your pardon, I gave you four and you had five.

The COURT.—If you have them, they will show for themselves. Anything further on direct?

Q. Are you familiar with the market value of Crystal Copper Company stock? A. Yes, sir.

Q. Since October, 1921? A. Yes, sir.

Q. What was the highest market value of this stock since October, 1921 to the present time?

A. It approached two dollars.

Q. That is per share? A. Yes, sir. [135]

Q. You were general manager all the time between

June, 1921 to February, 1922, were you not, Mr. Alderson?

A. Why practically most of that time; they changed my title two or three times, but in effect I was in absolute charge.

Q. General manager? A. Yes, sir.

Q. And during that time, how many men working down in the mine did you have on the pay roll working for day's pay?

Mr. WALKER.—To which we object as immaterial.

The COURT.—What is the object?

Mr. McCRACKEN.—To show that the mine was worked almost wholly by lessors.

The COURT.—Ask him so. Don't be beating about the bush. The objection is sustained.

Q. During all of this time the mine was worked entirely by leasers, all the development work was done by leasers? A. It was not.

Q. What development work did you do that you didn't lease?

Mr. WALKER.—Objected to as immaterial.

The COURT.—Sustained.

Q. What portion of the mine did you lease?

Mr. WAGNER.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—He may answer. Overruled.

A. Possibly as much as one-third, to a half at various times.

Q. You had one leaser up there by the name of Mr. Seam? A. Yes, sir.

Q. And Mike Zugal?

Mr. WALKER.—We object to this as immaterial. I don't see [136] the bearing unless to encumber the record.

The COURT.—What is the object?

Mr. McCRACKEN.—To show that the mine was worked almost entirely by leasers.

The COURT.—He has answered to the proportion, unless you are prepared to show the contrary. Sustained.

Cross-examination by Mr. WALKER.

Q. You say at one time you had two hundred shares of Crystal Copper Company stock belonging to Gaido and 200 belonging to Tamietti?

A. Yes, sir.

Q. Did you have that as an individual, that is you personally? A. Yes, sir.

Q. Did the Crystal Copper Company have anything to do at all with that stock?

A. Nothing whatever.

Q. In so far as the transaction with reference to that stock is concerned, counsel asked the question, or the matter was brought out, with reference to you tendering the stock back to these men. Did the Crystal Copper Company have any connection at all? A. Nothing whatever.

Mr. TYVAND.—We object to that as calling for for a conclusion of the witness, and not proper cross-examination.

The COURT.—Overruled.

Exception.

Q. I will ask you whether or not the Crystal Copper Company [137] had anything to do with any stock transaction with any of the plaintiffs in this case, Gaido, Tamietti or Monzetti?

Mr. McCRACKEN.—That is objected to as not being proper cross-examination.

The COURT.—I think so. Sustained.

Redirect Examination by Mr. McCRACKEN.

Q. At the time you made this tender to Mr. Tyvand and myself you were general manager of the Crystal Copper Company at that time, were you not? A. I was.

Q. And acting as such? A. Yes, sir.

Recross-examination by Mr. WALKER.

Q. You were asked the question you were acting as such. Were you acting in the capacity of manager of the Crystal Copper Company when you tendered this stock?

A. No, sir, I was acting as individual. I wanted to get the case settled.

Q. Who was the owner of the stock at that time?

A. I was.

Redirect Examination by Mr. McCRACKEN.

Q. You came up there and wanted us to dismiss the case against the Crystal Copper Company. You were general manager at the time? [138]

A. Yes, sir.

Q. You were doing this for and on behalf of the company, were you not?

A. I had settled the case with the plaintiffs on the

first day of February, and they assigned the stock back to me in the settlement.

Q. They assigned it back to you? A. Yes, sir.

Q. Have you got that assignment with you?

A. Yes, sir, I have. (Handing document to counsel.)

Q. Where did you get this stock?

A. I bought it from the brokerage firm of E. H. Walker Company, Boston, Massachusetts.

Q. You didn't receive this personally from the plaintiffs? A. Yes, sir, I did.

Q. Whereabouts?

A. In the city of Walkerville.

Q. As a matter of fact those five hundred shares of stock that the east sold to the brokers was in Butte?

A. No, sir, I got those certificates if you want them. I will give you those too. (Handing document to counsel.) I was holding those five hundred in trust for them, and they assigned them over to me. Here is the five hundred each they sold.

Q. There is the five hundred shares they sold.

A. Yes, sir. [139]

Q. Did you explain to them when you got them to assign this what the transaction was?

A. Most assuredly they knew what they were doing. I afterwards paid Mr. Monzetti for his shares, and have a receipt from him in full.

Q. Did you ever pay Mr. Tamietti, Batt Tamietti, one of the plaintiffs, for any assignment?

A. No, sir, I offered it to him and he wouldn't take it.

Q. You never gave him anything for signing it?

A. Yes, sir.

Q. What did you give him?

A. No, I didn't give him anything for signing it.

Q. Did you ever give Pete Gaido, one of the plaintiffs, anything for signing it?

A. No, sir, I didn't; they accepted my word for the two hundred shares that was coming to them.

Recross-examination by Mr. WALKER.

Q. You say you had settled with these plaintiffs.

Mr. McCRACKEN.—We ask to strike that as a conclusion of the witness. It is a voluntary statement.

The COURT.—He may ask the question, and you can interpose an objection.

Q. You say Mr. Alderson, you had settled with these plaintiffs. A. Yes, sir.

Q. What do you mean by that; explain to the Court and jury, if you will.

Mr. McCRACKEN.—We object to that as calling for a conclusion [140] of the witness and not proper cross-examination.

The COURT.—He may answer, if that is the objection, overruled.

A. I took a check to the plaintiffs in the case for what was due to them on a carload, and they had about an hour's time hauling me over the coals for cancelling the lease, but we talked over the situation for an hour, they did most of the talking, and when they got through, they concluded to settle everything amicably, and took a check for eighty dollars

and something, one of the checks that's in the case here, eighty dollars and something, and took the two hundred shares of stock coming to them, and the payment on the next car of ore that was on the way to the smelter, and we would call everything square.

Q. Did they agree to the settlement to which you refer? A. Yes, sir.

Mr. TYVAND.—To which we object as calling for a conclusion of the witness.

The COURT.—I don't see any settlement there. He wasn't giving them anything only what they were entitled to, according to his own statement. Sustained. There is no settlement there as I understand it. Proceed.

Witness excused. [141]

Mr. WAGNER.—I now desire to offer in evidence, may it please the Court, a tender which is one of the court records here.

(Document received in evidence and is as follows:)

(Title of Court and Cause.)

"To Batt Tamietti and Pete Gaido, Two of the Plaintiffs Above Named, and to Messrs. Tyvand & McCracken, Your Attorneys:

Gentlemen:

Comes now the defendant and offers to plaintiff, Batt Tamietti, eleven & 43/100 ($11.43) dollars, and to the plaintiff, Pete Gaido, eleven & 42/100 ($11.42) dollars, and renews its tender of the same and hereby deposits the said sums amounting to twenty two & 85/100 ($22.85) dollars together with

accrued interest thereon from the 16th day of January, 1922, to the present time, which interest is at the legal rate, which said sums, including principal and interest, amounting to twenty-eight ($28.00) dollars.

This payment and tender is made for the use and behoof of the said Batt Tamietti and Pete Gaido plaintiffs above named in full settlement of balance due to them on ores shipped prior to the 16th day of January, 1922, and on all ores shipped and mined at and from the Goldsmith Mine, Butte, Silver Bow County, Montana for and on account of work and services done and performed by said parties in connection with the plaintiffs or otherwise, in full settlement of all claims and demands which said Batt Tamietti and Pete Gaido may have against the defendant.

Dated this 2d day of December, 1924. [142]

C. S. WAGNER,
WALKER & WALKER,
Attorneys for Defendant.

Service of the foregoing offer and tender admitted and refused this 2d day of December, 1924.

H. A. TYVAND &
F. E. McCRACKEN,
Attorneys for Plaintiffs."

Mr. WAGNER.—I think counsel for the plaintiffs will agree that the money is on deposit with the clerk?

Mr. TYVAND.—Yes.

Mr. WAGNER.—We are ready to go ahead and put on the balance of our testimony, but if the

(Testimony of Harrison E. Clement.)

plaintiffs wish to finish their case, why we will agree to it.

The COURT.—They may.

TESTIMONY OF HARRISON E. CLEMENT, FOR PLAINTIFFS (RECALLED).

HARRISON E. CLEMENT, a witness heretofore called on behalf of the plaintiff, recalled to the stand for further

Direct Examination by Mr. McCRACKEN.

The WITNESS.—During the recess of the court at noon I ascertained that there were two duplicates of the smelter returns in exhibit "O" with smelter returns already in evidence,—one duplicate between the two exhibits. The ones which are not duplicates are dated October 17th and November 10th.

Mr. McCRACKEN.—I wish to offer exhibit "O" in evidence.

(Document received in evidence, marked Plaintiff's Exhibit "O" and is as follows:) [143]

PLAINTIFFS' EXHIBIT "O."

AMERICAN SMELTING AND REFINING CO.

East Helena Plant, East Helena, Mont.

Ore Settlement Sheet.

Mine—Goldsmith. Shipping Point—Butte.

Bought of Crystal Copper Co. Date—Oct. 17th, 1921.

Assays Per Ton.		Percentage.	
Gold—	.36 Ounces	for 95 Per Cent @	$20.
Silver—	43.1 Ounces	for 100 Per Cent @	.99¼
Lead—Per Cent		for 90 Per Cent	
Copper—Per Cent		for 100% Dry (Wet Less 1.3)	
Insoluble—Per Cent			
Iron—Per Cent			
Manganese—Per Cent			
Lime—Per Cent			
Zinc—2.9 Per Cent		Over Per Cent 30¢	
Sulphur—Per Cent			
Speiss—Per Cent			

Serial Number	Our Number	Car Number	Gross Weight	% Moisture	Number of Sacks
2311	2369	58048	110680	2.9	

Mine No. 26.

Weight of Sacks.

Date of B/L.
Date of arrival—Oct. 10th, 1921.
Quotations:
Silver, .99¼
Lead
Copper

AMERICAN SMELTING AND REFINING CO.

By M.

Keep this statement.
Checked by W. [144]

Prices.	Debit.	Credit.
Gold—Per Ounce Less Treatment		6.84
Silver—Per Ounce 5% @ 99¼ per oz.	2.14	42.78
Lead—Per cwt. Less —— cents per lb.		
Copper—Per lb. Less —— cts. per lb.		
Insoluble—Per Unit		
Iron—Per Unit		
Manganese—Per Unit		
Lime—Per Unit		
Zinc—Per Unit	.87	
Sulphur and Speiss. Treatment per ton	10.00	
Totals	13.01	49.62
Net value per ton		36.61

Net Weight.	Per Ton.	
107470	36.61	1967.24
Freight	128.52	
War tax	3.86	
Additional freight on bullion to New York 90% of the lead @ 6.35 per ton plus increase of $6.15 per ton, effective August, 1920.		
Sampling		
Totals	132.38	1967.24
Net Proceeds		1834.86

A charge of five dollars made for sampling on all lots of ore containing less than five tons. Rates subject to change without notice, except on contracts for specified time or specified tonnage. [145]

Notations on back of foregoing sheet:

Voucher No. 3726. Mont., Oct. 21.

Goldsmith—2369–26	1834.86
Less 23%	422.02
Total	1412.84
Leasers—one-half	706.42
Monzetti—Check 7277	143.33
Pagliero—Check 7278	143.33
Batt Tamietti—Check 7279	143.33
Frank Tamietti—Check 7280	153.57
Pete Giago—Check 7281	122.86
	$706.42

[146]

AMERICAN SMELTING AND REFINING CO.

East Helena Plant, East Helena, Mont.

Ore Settlement Sheet.

Mine—Goldsmith. Shipping Point—Butte.

Bought of Crystal Copper Company. Date Nov. 10th, 1921.

	Assays Per Ton.	Percentage.
Gold—	.63 Ounces	for 95 Per Cent @ $20.
Silver—	78.2 Ounces	for 100 Per Cent @ .99¼
Silver—	78.2 Ounces	5% treatment @ .99¼
Lead—Per Cent		for 90 Per Cent
Copper—Per Cent		for 100% Dry (Wet Less 1.3)
Insoluble—Per Cent		
Iron—Per Cent		
Manganese—Per Cent		
Lime—Per Cent		
Zinc—4.3 Per Cent		Over Per Cent 30¢
Sulphur—Per Cent		
Speiss—Per Cent		

Serial Number	Our Number	Car Number	Gross Weight	% Moisture	Number of Sacks
2573	2019	58277	113000	3.1	

34. Mine No.

Weight of Sacks.

Date of B/L.
Date of Arrival, Nov. 2d, 1921.
Quotations:
Silver, .99¼
Lead
Copper
AMERICAN SMELTING AND REFINING CO.

By M.

Keep this statement.
Checked by W. [147]

Prices.	Debit.	Credit.
Gold—Per Ounce		11.97
Silver—Per Ounce		77.61
Silver—Per Ounce	3.88	
Lead—Per cwt. Less —— cts. per lb.		
Copper—Per lb. Less —— cts. per lb.		
Insoluble—Per Unit		
Iron—Per Unit		
Manganese—Per Unit		
Lime—Per Unit		
Zinc—Per Unit	1.29	
Sulphur and Speiss. Treatment per ton	11.00	
Totals	16.17	89.58
Net value per ton		73.41

Net Weight.	Per Ton.	
109497	73.41	4019.09
Freight and War tax	142.34	
Umpire Assay		
Additional freight and War tax on bullion to 90% of the lead @ $6.35 per ton.		
Sampling		
Totals	142.34	4019.09
Net Proceeds		3876.75

A charge of five dollars made for sampling on all lots of ore containing less than five tons. Rates subject to change without notice, except on contracts for specified time or specified tonnage. [148]

Notations on back of foregoing sheet:

Net Proceeds	3876.75
Royalty 34½%	1337.48
Net from smelter	2539.27
Leasers—one-half	1269.64

Checks drawn:

7396—Stock subscription	$125.00
7397—Frank Tamietti	228.93
7398—Batt Tamietti	228.93
7399—John Pagliero	228.93
7400—Lawrence Mansanti	228.93
7401—Pete Giago	228.92
	$1269.64

Filed Dec. 15, 1924. C. R. Garlow, Clerk. [149]

(Testimony of Harrison E. Clement.)

The WITNESS.—I have no engineer reports on the territory surrounding the winze that is involved in this litigation, and have no assays from samples taken of ore from the territory involved that can be identified. I do not know of my own knowledge what the footwall lead in the territory involved in this action assays. I have settlement sheets from the smelter under date of February 25, 1922, car No. 2845, also settlement sheets from the smelter under date of March 21, 1922, car No. 1677, also date of April 11th, 1922, car No. 2069. I do not know where the ore came from that was shipped to the smelter and the returns that is reported or purported to be made in Plaintiff's Exhibit "Q"; don't know what portion of the mine. I have in my possession settlement sheet from the smelter under date of April 22, 1922, car No. 4,901; also May 10, 1922, car No. 1,461, and June 5th, 1922, car No. 2,791. Examining Plaintiff's Exhibit "R" for Identification, which purports to be smelter returns on ore shipped from the Goldsmith mine, I will say of my knowledge I don't know where the ore came from. The book which you show me containing 152 pages is the property of the Crystal Copper Company, the defendant. This book which you hand me, containing 152 pages, is also the property of the Crystal Copper Company, and at the present time it is used to enter the settlement sheets as they come in in detail. I cannot say that it was used for the same purpose during the years 1921 and 1922.

(Testimony of Harrison E. Clement.)

Q. Has there been any entry made of car purporting to have been shipped December 27th, 1921, car No. 58994, in the book?

Mr. WALKER.—If the Court please, we object to the introduction of this book in evidence unless it is shown by plaintiff's counsel that it is a book with the items entered therein [150] correctly, by whom the items were made, and if made in the course of business.

Mr. McCRACKEN.—I haven't come to that yet.

Q. You may answer the question.

A. You mean as to whether there is an entry of those items under the date of September 27th, 1921, and I see car No. 58994.

Q. I have no way of knowing whether those entries were made in the due course of business or not. At the present time Thomas Tutty is our bookkeeper, but I don't know who was keeping the books during the years 1921 and 1922. The book is now kept in the regular course of business and is a record of the corporation, being the records of the local office. The book was there when I came there. I think the system of making the entries of the car numbers is different, but probably the information is entered from the settlements. We made and keep entries made under the date of September 27, 1921, October 17, October 27, November 10th, November 26th, December 9th, December 31st, January 31st, and March 4, 1922—we made a copy of the lines on the books under those dates, and figures on the lines, and also a copy of February 25th, 1922, March 21,

(Testimony of Harrison E. Clement.)

1922, and April 11, 1922, and April 27, 1922, May 10, 1922, and June 5, 1922. We also made some additions and subtractions on that entry. Plaintiff's proposed exhibit "S" is one of the copies we made on those entries.

I don't know whether the ore has been taken out on the hanging-wall side at the bottom of this winze up to the 500 foot level or not. I have been in that portion of the winze, that is the bottom of the winze has been timbered and it is partly caved, and it is impossible to get into the old stopes. [151] It was timbered up at the time I came to work there and caved in. We have maps of the levels but no stope maps; no maps showing what was stoped.

Witness excused. [152]

TESTIMONY OF FRANK TAMIETTI, FOR PLAINTIFFS.

FRANK TAMIETTI, one of the plaintiffs, called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. McCRACKEN.

The WITNESS.—My name is Frank Tamietti; I reside in Walkerville, Montana, and am a brother of Batt Tamietti, one of the plaintiffs. I am named as one of the plaintiffs in this action but have got nothing to do with the case. I was working in partnership with Batt Tamietti, Lawrence Monzetti, Pete Gaido and John Pagleero on the 15th of January, 1922, but not the 16th. I worked in the Gold-

(Testimony of Frank Tamietti.)

smith mine on and after January 15th, and in a winze something like about one thousand feet in a northwesterly direction from the No. 1 shaft on the 500 foot level, and took out some ore there from that winze and shipped it to the smelter. Having examined Plaintiff's Exhibit "Q," I will state I am the same party who is named on the back thereof as Frank Tamietti, in the return. That is the ore that was left there. After they left there was three cars and not any more. We shipped those three cars that was left on this old stope that we had the lease between.

Mr. McCRACKEN.—We will offer exhibit "Q" in evidence. It shows the value was taken from the place after the lease was taken on the part of plaintiff.

Mr. WAGNER.—We object as incompetent, irrelevant and immaterial for any purpose. May it please the Court, the testimony so far discloses that they were operating under a license and ~~got~~ not a lease, and therefore plaintiffs are not entitled to [153] recover for any ores thereafter shipped from the mine or any place in the mine.

Examination by the COURT.

The WITNESS.—This is supposed to be the ore taken out the return of shipments from this very same property worked by the plaintiffs, the very same ground that I worked, and I know that because I stayed there until I saw the last car of ore, John Pagleero and I.

The COURT.—The objection is overruled.

Mr. WAGNER.—Exception.

(Document received in evidence, marked Plaintiff's Exhibit "Q," and is as follows:) [154]

PLAINTIFFS' EXHIBIT "Q."

ANACONDA COPPER MINING CO.,
WASHOE SAMPLER.

Received from Crystal Copper Co.
Butte, Montana, February 25, 1922.

(Frank Tamietti)

Class—Gold and Silver.

Address—Butte, Montana.

Mine—Goldsmith.

Sampler No.	Weights Pounds Gross	Per Cent Water	Assays Per Cent Electrolytic Copper	Assays Ounces Silver	Assays Ounces Gold
29135	106620	2.7	——	55.0	0.44

Working Charge. Dollars.	Price Per Ton. Dollars.	Value. Dollars.	Draft No.
12.98	49.73	2579.52	
	N. P. Freight	13.33	
		2566.19	
	W. A. Clark and Bro.—Royalty 23%	590.22	9361
		1957.97	9360

Car No.
BAP 2845.
Zn. Pb. Insol. Fe.

Quotation and Settlement Basis:

Copper	Silver	Gold	Zinc	Lead
	99⅝	$20.00		

Less 3¢.

%	100%	90%	%	%

ANACONDA COPPER MINING CO.,
WASHOE SAMPLER.
By L. R. MARGETTS,
Superintendent. [155]

Notations on back of foregoing sheet:
Net from smelter.....$1975.91
Leasers—one-half .....$ 988.

Hospital Dues Six Persons Feb. $6.00
Industrial Accident Jan. 16th to Feb. 28, 6 persons 23.40
Check 7694—Harry Daniels 75.50
Check 7755—Anton Carlevato—30 days—$1.00 ..... 141.50
Check 7756—Sanz—23 days—$1.00 ..... 108.25

$354.65

Check 7757—E. H. Walker, Secy. 50.00
Check 7758—Pete Vidack 16.65
Check 7759—Ralph Paasch 16.65
Check 7760—John Veal 16.70
31½ ds. Check 7761—John Pagliero $166.95 —$25 stock sb. 141.95
32 ds. Check 7762—Frank Tamietti $169.60 —$25 stock sub. 144.60

29 ds. Check 7763—Coston Ponsetti 153.70
—$25 Vidack contract..... 128.70
27 ds. Check 7764—Wm. Bullock $143.10
—$25 Vidack contract..... 118.10

$988.00

[156]

ANACONDA COPPER MINING CO.,
WASHOE SAMPLER.

Butte, Montana, March 21, 1922.

Received from Crystal Copper Company.
(Frank Tamietti)
Address—Butte, Montana.
Mine—Goldsmith.

Class—Gold and Silver.

Sampler No.	Weights Pounds Gross	Per Cent Water	Pounds Dry	Per Cent Electrolytic Copper	Assays Ounces Silver	Ounces Gold
29277	124280	1.4	122540	——	98.7	0.74

Working Charge. Dollars.	Price Per Ton. Dollars.	Value. Dollars.	Draft No.
12.42	99.23	6079.82	
N. P. Freight		15.54	
		6064.28	
W. A. Clark & Bro. Royalty 34½%		2092.18	9448
		3972.10	9449

Car No.
BAP 1677
Zn. Pb. Insol. Fe.
Working charge $7.50 plus 5%of silver value.

Quotation and Settlement Basis:

March 16, 1922.

Copper	Silver	Gold	Zinc	Lead
	99⅝.	$20.00		
Less 3¢.				
%	100%	90%	%	%

ANACONDA COPPER MINING CO.,
WASHOE SAMPLER.
By L. R. MARGETTS,
Superintendent. [157]

Notations on back of foregoing sheet:

Net returns from smelter.....$3972.10
Leasers—one-half 1986.05

Check 7845—John Waldie, loading car 2845, Feb. 15.....	$6.50
Check 7846—Matt Sutter, loading car 2845, Feb. 15.....	6.50
Check 7896—Barry Murphy, loading car 1677	15.50
Check 7894—Antonio Carlevato, 24 d. @ 4.75	114.00
Check 7895—Joe Sanz, 17 d. @ 4.75.....	80.75
Check 7897—E. H. Walker, Secy., stock..	50.00
Check 7898—Pete Vidack	16.70
Check 7899—Ralph Paasch	16.65
Check 7900—John Veal	16.65
Check 7901—John Pagliero	424.45
Check 7902—Wm. Bullock	414.45
Check 7903—Caston Ponsetti	404.45
Check 7904—Frank Tamietti	419.45
	$1986.05

[158]

ANACONDA COPPER MINING CO.,
WASHOE SAMPLER.

Received from Crystal Copper Company.

Butte, Montana, April 11, 1922.

(Frank Tamietti)

Address—Butte, Montana.

Mine—Goldsmith.

Class—Gold and Silver.

Sampler No.	Weights Pounds Gross	Per Cent Water	Pounds Dry	Per Cent Electrolytic Copper	Assays Ounces Silver	Ounces Gold
29384	93260	2.6	90835	——	73.7	0.52

Working Charge. Dollars.	Price Per Ton. Dollars.	Value. Dollars.	Draft No.
14.84	67.94	3085.66	
N. P. Ry. Freight		11.66	
		3074.00	
W. A. Clark & Bro. Royalty 34½%		1060.53	9516
		2013.47	9517

Car No.

BAP 2069.

Zn. Pb. Insol. Fe.

Working charge $7.50 plus 10% of silver value.

Quotation and Settlement Basis:

April 13, 1922.

Copper	Silver	Gold	Zinc	Lead
	99⅝	$20.00		

Less 3¢.

%	100%	90%	%	%

ANACONDA COPPER MINING CO.,
WASHOE SAMPLER.
By L. R. MARGETTS,
Superintendent. [159]

Notations on back of sheet:
Net return $2,013.47
Leasers' one-half 1,006.74

Mar. 31.	Hospital dues 6 persons—$6.00.		
" "	Industrial Accident 6 persons—$15.60	$21.60	
Apr. 12.	Barry Murphy, loading car	5.83	7982
	W. R. Richards, loading car	5.83	7983
	Antonio Carlevato, 21 days, less $1.00.....	98.75	7984
	Joe Sanz, 19 days—$1.00	89.25	7985
	Wm. Bullock, 18 shifts, 196.37, plus 3.75....	200.12	7986
	Costan Ponsetti, 17 shifts, equals $196.37, less $5, plus $3.75....	195.12	7987
	John Pagliero—16 shifts, equals $196.37, less $10, less $25, plus $3.75	165.12	7988
	Frank Tamietti, 18 shifts, equals 196.37, less $25, plus 3.75...	175.12	7989
	E. H. Walker, Secy., Stock Sub.	50.00	7990
		$1,006.74	

Filed Dec. 15, 1924. C. R. Garlow, Clerk. [160]

(Testimony of Frank Tamietti.)

The WITNESS.—Plaintiff's Exhibit "R" are settlement sheets from the smelter, and this is my name on the back. I got every cent of money which purports to be delivered to me on that. The ore shown on those sheets, settlement sheets, was taken from the stope and drift, where we finished one end to the other, a little block of ground that was left in the stope, and amounted to three cars, and was taken out between the bottom of the drift on the five hundred foot level.

Mr. McCRACKEN.—We ask to introduce exhibit "R."

Mr. WAGNER.—The same objection.

The COURT.—Let it be admitted.

(Paper received in evidence, marked Plaintiff's Exhibit "R," and is as follows:) [161]

PLAINTIFFS' EXHIBIT "R."

ANACONDA COPPER MINING CO.,
WASHOE SAMPLER.

Butte, Montana, April 27, 1922.

Received from Crystal Copper Company.
(Frank Tamietti)
Address—Butte, Montana.
Mine—Goldsmith.

Class—Gold and Silver.

Sampler No.	Weights Pounds Gross	Per Cent Water	Pounds Dry	Per Cent Electrolytic Copper	Assays Ounces Silver	Ounces Gold
29489	122760	3.0	119077	——	39.9	0.32

Working Charge. Dollars.	Price Per Ton. Dollars.	Value. Dollars.	Draft No.

11.18	31.34	1865.94	
N. P. Ry. Freight		15.35	
		1850.59	
W. A. Clark & Bro. Royalty 23%		425.64	9573
		1424.95	9574

Car No. BAP 1401.
Zn. Pb. Insol. Fe.

Working charge $7.50 plus 10% of silver value.

Quotation and Settlement Basis:

April 21, 1922.

Copper	Silver	Gold	Zinc	Lead
	99⅝	$20.00		
Less 3¢ .				
%	100%	90%	%	%

ANACONDA COPPER MINING CO.,
WASHOE SAMPLER.
By L. R. MARGETTS,
Superintendent. [162]

Notations on back of foregoing sheet:

Net returns	1424.95
Leasers' one-half	712.48

Hospital dues, 6 persons, April	6.00
Ind. Accident dues, 6 persons, April	15.60
Ch. 8073—Barry Murphy, loading car	6.50
Ch. 8074—W. R. Richards	6.50
Ch. 8075—Antonio Carlevato, 16 das. @ 4.75, $84, less 2	82.00

Ch. 8076—Joe Sanz, 15½ das. @ 4.75, 81.65, less 2 ..... 79.65
Ch. 8077—Wm. Bullock, 32 shifts..... 129.05
Ch. 8078—John Pagliero, 31 shifts, $125.05, less 2 ..... 123.05
Ch. 8079—Costan Ponsetti, 32 shifts, $129.05, less 2..... 127.05
Ch. 8080—Frank Tamietti, 32 shifts, 129.07, less 2 ..... 127.07
Ch. 8081—Road tax, five persons..... 10.00

$712.47

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ANACONDA COPPER MINING CO.,
WASHOE SAMPLER.
Butte, Montana, May 10, 1922.

Received from Crystal Copper Co.
(Frank Tamietti)
Address—Butte, Montana.
Mine—Goldsmith. Class—Gold and Silver.

Sampler No.	Weights Pounds Gross	Per Cent Water	Pounds Dry	Per Cent Electrolytic Copper	Assays Ounces Silver	Ounces Gold
29604	121620	3.0	117971	——	25.4	0.20

Working Charge.	Price Per Ton.	Value.	Draft No.
10.03	18.87	1113.06	
N. P. Ry. Freight		15.20	
		1097.86	
W. A. Clark & Bro. Royalty 11½%		126.25	9621
		971.61	9622

Car No.
BAP 1461.
Zn. Pb. Insol. Fe.

Working charge $7.50 plus 10% of silver value.

Quotation and Settlement Basis:

May 5, 1922.

Copper	Silver	Gold	Zinc	Lead
	99⅝	$20.00		
Less 3¢				
%	100%	90%	%	%

ANACONDA COPPER MINING CO.,
WASHOE SAMPLER.
By L. R. MARGETTS,
Superintendent. [164]

Notations on back of foregoing sheet:

Net returns	$971.61
Leasers' one-half	485.80
Ch. 8110—Barry Murphy loading	$6.65
Ch. 8111—W. R. Richards loading	6.65
Ch. 8112—Antonio Carlevato, 10 days, @ $4.75	47.50
Ch. 8113—Joe Sanz, 10 days, @ $4.75	47.50
Ch. 8114—Wm. Bullock, 14 days	91.85
Ch. 8115—John Pagliero, 15 days	96.90
Ch. 8116—Costan Ponsetti, 15 days	96.90
Ch. 8117—Frank Tamietti, 14 days	91.85
	$485.80

f165]

ANACONDA COPPER MINING CO.,
WASHOE SAMPLER.

Butte, Montana, June 5, 1922.

Received from Crystal Copper Co.
(Frank Tamietti)
Address—Butte, Montana.
Mine—Goldsmith. Class—Gold and Silver.

Sampler No.	Weights Pounds Gross	Per Cent Water	Pounds Dry	Per Cent Electrolytic Copper	Assays Ounces Silver	Ounces Gold
29769	128660	2.2	125829	——	34.8	0.26

Working Charge. Dollars.	Price Per Ton. Dollars.	Value. Dollars.	Draft No.
10.97	28.38	1785.51	
N. P. Freight		16.08	
		1769.43	
W. A. Clark & Bro. Royalty 23%		406.97	9715
		1362.46	9716

Car No. BAP. 2791.
Zn. Pb. Insol. Fe.
Working charge $7.50 plus 10% of silver value.
Quotation and Settlement Basis:
May 26, 1922.

Copper	Silver	Gold	Zinc	Lead
Less 3¢	99⅝	$20.00		
%	100%	90%	%	%

ANACONDA COPPER MINING CO.,
WASHOE SAMPLER.
By L. R. MARGETTS,
Superintendent. [166]

(Testimony of Frank Tamietti,)

Notations on back of foregoing sheet:

Net proceeds	1362.46	
Leasers' one-half	681.23	
Hospital dues, 6 persons, May		$6.00
Industrial Accident, 6 persons in May		15.60
8201—W. R. Richards, loading car		8.00
8202—Barry Murphy, loading car		8.00
8203—Antonio Carlevato, $80.75, less $1.00		79.75
8204—Joe Sanz, 18 ds., $85.50, less $1.00		84.50
8205—Wm. Bullock, 26½		121.00
8206—John Pagliero, 26		118.70
8207—Caston Ponsetti, 26		118.70
8208—Frank Tamietti, 26½ days, less $1.50 for plank		119.50
Plank		1.50
		$681.25

Filed Dec. 15, 1924. C. R. Garlow, Clerk. [167]

The WITNESS.—I worked the hanging-wall side of this vein up to the 500 foot level, and the ore ran partly in places right close to the winze, but it didn't run very far. If I had a map I could tell you; ran close to the track, ran up to the 500 foot level, or close to the winze for about 75 feet from the east; it didn't run exactly to the level, and we had to stop there because the ore was no good; no value in it.

Cross-examination by Mr. WALKER.

The WITNESS.—After January 16th, 1922, when Lawrence Monzetti, Pete Gaido and Batt

(Testimony of Frank Tamietti,)

Tamietti were stopped working there I and John Pagleero continued in the same ground, and took out all the ore that was left in that ground where we had a lease, three cars; there were three cars in that territory.

You can tell by the date of the smelter returns which of these three cars was the shipment of ore we took out on this particular ground. We never did take out any ore of any value on the east side of the fault, and the highest value we took out was on the old stope or what you call the old lease. On that ground my brother, Lawrence Monzetti, Pete Gaido, John Pagleero and I had prior to the 16th day of January, 1922, all the ground that we had under that contract or lease or agreement, whatever it was, there was only three cars left. John Pagleero and I, after January 16th, 1922, did development work or prospective work along the footwall in the particular ground that Batt Tamietti, my brother, John Pagleero, Pete Gaido, Lawrence Monzetti and I had prior to the 16th of January, 1922; we prospected the footwall in that particular ground. On the first forty-five feet from the winze Mr. Alderson came down and said for us boys to start and open up the footwall ore [168] that it was showing up on the level, for which we sunk our winze, and they were with us until the 15th or 16th, I don't know what you call it, the last day in January; and we went and tapped the lead and when we tapped the lead we found a little streak there that we did sample, and what we took

(Testimony of Frank Tamietti,)

out I know we didn't take out more than about a mine car, and after that they got through it, and, of course, after a while I will tell you why. They got through after and we keep going to work, and we want to go and raise. We went a little east, not very much from these raise or cross-cut or what you call it, about a set, and we went up a hole there but didn't have any value. Well, Mr. Alderson comes down and he says, "I am not satisfied with all of this," he says, "we got to make it sure," he says, "if we will leave any more ore on the footwall." He says, "You boys," he says, "you got to start another cross-cut a little over east and develop this place and find out if there is any more ore left here." We decided to come over to the end of our drift where the fault cut off the both lead, and we went in a few feet, but they were not with us any more, and we drive this cross-cut in about forty feet; the lead was running more close over to the hanging-wall lead, we didn't have to go so far, and after that we drive from east, we drive, drift to west, and meet the other cross-cut where we tapped a lead of ore; the ore no good, didn't sample more than three or four ounces or six the most; we raised until we went to the level and the ore was no good there; didn't have no value in it, that is what I mean.

We did not ship any ore from the footwall; never shipped a car except what I told you in the cross-cut where we took out about a mine car, and that is all that was there. All the ore that was left in

(Testimony of Frank Tamietti.)

the ground that plaintiffs have been talking [169] about in the hanging-wall. we only shipped three cars. All the ore that was left in that ground that I and John Pagleero and Batt Tamietti and Lawrence Monzetti and Pete Gaido had this working agreement on which was terminated on the 16th of January, was three cars, in that block of ground. After we took the three carloads out there wasn't a pound of ore left there.

I did not consult with Mr. Tyvand or McCracken about being a party to this suit. I did not confer or consult with Messrs. Tyvand and McCracken or with the plaintiffs Lawrence Monzetti, Pete Gaido or Batt Tamietti, about this case. They came to me and wanted me to sign and go with them, and fight the case, but I said I would have nothing to do with it. I said the Crystal Copper Company, the manager, treated me good, and I have got nothing to say against it. I said, "If you want to fight it go ahead and do it yourself." We got fifty feet more ground than we asked for. I received all the stock and settled for all the stock I agreed to take.

Witness excused.

Mr. McCRACKEN.—If the Court please, that is our case in chief. [170]

TESTIMONY OF FRANK TAMIETTI, FOR DEFENDANT.

FRANK TAMIETTI, one of the plaintiffs, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. WAGNER.

Q. Mr. Tamietti, are you a party to this action?

Mr. TYVAND.—If the Court please, I object to that as being incompetent, irrelevant and immaterial, and asking for the conclusion of the witness.

The COURT.—Well, I think that has already been brought out, Mr. Wagner. Mr. Walker developed all of that feature of the case on cross-examination. The witness said he had nothing to do with it, as I understand it.

The WITNESS.—I have no interest in this litigation. I said I didn't have anything to do with it. I signed everything. I got the last check and the check will show, and if you sign the check that will show you are satisfied, and you haven't got any comeback. I got all the money that is coming to me. I have not got any stock coming from the Crystal Copper Company, but wish I had some coming.

Witness excused. [171]

TESTIMONY OF JOHN PAGLEERO, FOR DEFENDANT.

JOHN PAGLEERO, called as a witness on behalf of defendant, being duly sworn, testified as follows:

Direct Examination by Mr. WALKER.

The WITNESS.—My name is John Pagleero. I was originally from the 26th day of June, 1921, up until the 16th day of January, 1922, engaged in working in the Goldsmith Mine with Lawrence Monzetti, Pete Gaido, Bat Tamietti and Frank Tamietti, and am familiar with the ground in which we were operating; know the winze, the stopes and everything. After the lease, or agreement or contract, whatever it was, was terminated on the 16th of January, 1922, I and Frank Tamietti continued working there in the same ground. After they got through, I think it was three cars of ore that we took out on this side of the fault and four on the other; but am not sure, didn't keep track of that. I think it was three railroad cars that we took out of the particular ground they were working in. We took all the ore we could find that was left there after they had gone,—that we could find in the hanging-wall. There was some low grade, but nothing of value. We did some development work on the footwall in that ground. We drove a cross-cut on the footwall and then we drove a little drift in the footwall and drove up a couple of raises and couldn't find anything; there

(Testimony of John Pagleero.)

was lots of low grade but no value from the assay. We made no shipment from the footwall of any ores. I think we had about seven or eight hundred pounds. In the first cross-cut we found a little pocket, not quite a mining car, a few powder boxes full. [172]

After the arrangement between myself, Frank Tamietti, Bat Tamietti, Pete Gaido and Lawrence Monzetti was terminated on the 16th of January, 1922, I received a settlement in full for my stock and my money from the Crystal Copper Company. I have no interest in this case now.

The character of the ground in the footwall was pockety, irregular, sometimes good and sometimes bad.

Cross-examination by Mr. McCRACKEN.

The WITNESS.—Between the 26th day of June, 1921, and the 16th day of January, 1922, I and Frank Tamietti, Bat Tamietti, Lawrence Monzetti and Pete Gaido were partners in a lease in the Goldsmith mine, and we continued to work as partners during all of that time. When we were stopped and took out three cars beyond the fault, that was all in the same lead; it was all taken right there in the same place.

Witness excused.

Mr. WALKER.—We have nothing further.

Mr. McCRACKEN.—We would like to cross-examine Lawrence Monzetti further. [173]

TESTIMONY OF LAWRENCE MONZETTI, FOR DEFENDANT (RECALLED—CROSS-EXAMINATION).

LAWRENCE MONZETTI, a witness heretofore on the stand, recalled for further cross-examination, testified as follows:

Cross-examination by Mr. McCRACKEN.

The WITNESS.—I testified before in this case. At the time I signed Defendant's Exhibit "K" I was on the street, coming from work; had been working at the Mountain Con Mine, and this was about five o'clock at night; was just coming off shift; had been working during the day in a gassy place, and was sick at the time with gas. At the time I signed that Mr. Alderson did not ask me to dismiss the suit which was pending; didn't say anything about the suit then pending. I didn't read the instrument before signing it. He did not pay me any money other than what I already had coming for ores shipped before I signed the instrument; just paid what I already had coming. He did not give me any stock other than what I already had paid for before I signed the instrument. Exhibit "N" was signed at the same time exhibit "K" was signed; both signed the same time. In signing exhibit "K" the defendant nor Mr. Alderson gave me anything other than what I had coming at the time I signed them, that is what I had coming for ore already shipped, and stock I had already paid for. He did not make

(Testimony of Lawrence Monzetti.)

any explanation to me that it would be a release to the company on the suit then pending; he said nothing about a suit then pending.

Q. I hand you Defendant's Exhibits "M," "L," "J." State when you received those several checks represented by the exhibits just mentioned.

A. This one I received the same time when I signed the paper. [174]

Q. And the check represented by exhibit "J" and exhibit "L"?

A. It was over at my house.

Q. When you have reference to the papers you have reference to Defendant's Exhibit "K" and Defendant's Exhibit "N." You received "L" and exhibit "J" at the same time you signed exhibit "N," Defendant's Exhibit "N" and Defendant's Exhibit "K"?

A. Yes, sir, I got it the same time. Exhibit "L" represents $11.43 I had coming for a car which I already shipped. Exhibit "J" represents a check for stock which I sold to Mr. Alderson at the same time which I already had coming. Exhibit "M" I received on or about the 1st of February for ore I had shipped.

I don't read or write the English language very much. I cannot read exhibit "K"; couldn't read it; couldn't read Defendant's Exhibit "N."

Redirect Examination by Mr. WALKER.

The WITNESS.—Check marked Defendant's Exhibit "J" is payable to me for a hundred dollars, and that was for stock I sold Mr. Alderson.

(Testimony of Lawrence Monzetti.)

He did not explain it to me; just asked me if I wanted to sell my stock and I said yes. That was the two hundred shares of stock I had coming. That is my signature on the back of it. I was not suffering from gas when I signed that and got the money on it.

Defendant's Exhibit "M," a check dated February 1st, 1922, payable to Lawrence Monzetti for $80.85, was for ore that we shipped, after we were put out of the mine. I signed that; this is my signature. My head was not bad from gas when I took the money on that. I knew what it was about. Defendant's Exhibit "L," a check dated March 4, 1923, made payable to Lawrence [175] Monzetti, in the sum of $11.43, and signed by me on the back. I had an attack of gas when I got the money on that, and the gas affected my head. I know I got the money because it was coming to me; I was sick. This is my signature there. Mr. Alderson did not tell me what that was; he told me to sign this paper. I thought I sold him a share. This is a receipt for 100 shares of stock. I signed for him 200 shares of stock. I did not know what I signed when I signed for the stock. I had it coming. I met him and he told me to sign here, and get your money and I signed it and he didn't explain anything about it. I did not know all about the stock. I knew I had it coming and I took it, and signed a receipt for it. I knew I was signing that I sold the stock.

Q. And you were not suffering from gas; your

(Testimony of Lawrence Monzetti.)

brain was working because you knew and had thought about what you were doing, didn't you?

A. Yes, sir.

Witness excused. [176]

Mr. McCRACKEN.—If the Court please, plaintiffs move the Court to strike from the evidence Defendant's Exhibit "J," upon the grounds and for the reasons that the same is irrelevant and immaterial, that no consideration has been shown for the same, as Monzetti received nothing more than that which he had coming at that time, furthermore the signature was obtained at a time Monzetti was incompetent to act and did not know what he was doing, furthermore he was unable to read or write, also it does not prove or tend to prove any of the issues in this case as no release was plead in the answer.

The COURT.—The motion will be denied.

Exception.

Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit "K" as was made to exhibit "J."

The COURT.—Let the record show the same motion as to Defendant's Exhibit "K" and that the motion is denied.

Exception.

Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit "M" as was made to exhibits "J" and "K."

The COURT.—Let the record show the same

(Testimony of Lawrence Monzetti.)

motion as to Defendant's Exhibit "L" and that the motion is denied.

Exception.

Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit "M" as was made to exhibits "J," "K" and "L."

The COURT.—Let the record show the same motion as to Defendant's Exhibit "M" and that the motion is denied.

Exception.

Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit "N" as was made to exhibits "J," "K," "L" and "M."

The COURT.—Let the record show the same motion as to Defendant's Exhibit "N" and that the motion is denied.

Exception.

TESTIMONY OF BATT TAMIETTI, FOR PLAINTIFFS (RECALLED IN REBUTTAL).

BATT TAMIETTI, one of the plaintiffs, called to the stand in rebuttal, testified as follows:

Direct Examination by Mr. McCRACKEN.

The WITNESS.—I am the same witness who was on the stand yesterday. There has been no settlement between myself, Frank Tamietti, John Pagleero, Lawrence Monzetti, and Pete Gaido of the partnership affairs since January 16, 1922; no accounting. Neither Frank Tamietti, John Pag-

(Testimony of Batt Tamietti.)

leero, or the Crystal Company has paid me any money due and owing me since January 16th, 1922.

Witness excused.

Mr. McCRACKEN.—That is all.

Mr. WAGNER.—Comes now the defendant and moves the Court to direct a verdict in favor of the defendant and against the plaintiffs Pete Gaido, John Pagleero and Frank Tamietti, three of the plaintiffs named in this action, on the ground and for the reason that the evidence affirmatively discloses that they have no interest in this litigation but have settled in full with the Crystal Copper Company.

The defendant now moves the Court to direct a verdict in favor of the defendant and against all of the plaintiffs on the grounds and reasons following:

First: There is a fatal variance between the allegations and the proof in this, that plaintiffs rely for a recovery upon the proposition as alleged in their complaint that the plaintiffs were and are a mining copartnership, engaged in mine subleasing and subletting from the defendant Crystal [177] Copper Company, whereas the proof affirmatively shows and discloses that the relationship of mining partners does not and never did exist between these parties in so far as their negotiations and work for the defendant was concerned, but that the proof affirmatively discloses that they were operating and working under a license and not a lease, and that their relationship was nothing more than that of a working agreement for a share of the profits.

There is a fatal variance because the parties Lawrence Monzetti and Batt—the plaintiffs Pete Gaido and Batt Tamietti, if they have any cause of action at all against the defendant it would be as individuals for work, labor and services performed.

Next: That the evidence is insufficient in law to prove a mining copartnership between the plaintiffs in their relations with the defendant in this case. The evidence is insufficient to prove a lease between the plaintiffs and the defendants, and the evidence establishes if it establishes any contractual relationship at all, a contract embodying a license. The evidence is insufficient to establish a lease for the reason that a lease of the real property of a mining corporation may only be secured by compliance with the provisions of Section 6004 of the Revised Codes of Montana, 1921, which requires affirmative approval of the stockholders and the board of directors.

Next: The evidence is insufficient to warrant a recovery by the plaintiffs or any of them, upon the theory that they are a mining copartnership because under the express provisions of Section 8059 of the Revised Codes of Montana of 1921, the acts and deeds and things of a majority of the members of such [178] partnership controls all acts of the partnership, and it affirmatively appears in this case that a majority of the members of the so-called partnership have no interest in this litigation, and the same may not be maintained by a minority of the members.

Next: The evidence is wholly insufficient to prove any damages sustained by the plaintiffs or any of them in the event the Court should hold that they were operating under a lease and not a license for the reason that the evidence pertaining to proof of prospective profits or damages by reason of the cancellation of the lease falls short of giving to the jury any tangible basis upon which to base any rational judgment as to damages, but that it would require speculation and conjecture to reach any verdict, and the same would be the result of mere guesswork having no foundation in the evidence in this case, particularly for the reason that there is no evidence showing or tending to show how long it would have required the plaintiffs to mine the ore in place which they contend they were deprived of mining, nor the cost of mining such ore nor the incidental expenses, or work or labor necessary to prepare the ore for shipment, nor is there any evidence in this case showing what the ore if mined could have been smelted for, nor what proportion of the net profits of such ore proportionate of the net profits in dollars would accrue to the plaintiffs. There is no evidence before the Court showing what the market price of the metals contained in the ore and from which the plaintiffs would derive net proceeds was or would be.

Further, the contract contended for by the plaintiffs as alleged in their complaint is one void under the statute of frauds of the State of Montana, and the proof in this case [179] discloses that the contract contended for in the complaint is not a lease but a working contract or license.

These matters being directed to the first count.

Upon the second count we urge all of these matters and in addition that plaintiffs may not recover under the second count under any theory of the case for the reason that it affirmatively appears from the evidence in this case that any stock transaction or transactions for the capital stock of the Crystal Copper Company were had with Matt W. Alderson as an individual and not as a representative of the defendant company, and for the further reason that there is no evidence in this case to prove any damages which plaintiffs sustained or might have sustained by reason of nondelivery of any stock to them to be earned in the future. That the measure of damages for breach of an agreement to sell personal property not paid for is fixed by statute, particularly sections 8674 and 8700 of the Revised Codes of Montana of 1921. There is no evidence to show the measure of damages as fixed by these sections of the code, in that the evidence fails to disclose that the value of the property of the stock in question was the market price thereof and the price at which it might have been bought or its equivalent bought in the market nearest to the place where the stock should have been delivered or would have been delivered and put into the possession of the plaintiffs if entitled thereto at all at such time after the breach of duty upon which plaintiffs' rights or the rights of any of the plaintiffs to damages accrued or within such time as would suffice with reasonable diligence for them to have purchased the stock at the nearest or in the open market. [180]

As directed to all of the evidence and to both counts of the complaint, the evidence wholly fails to show any measure of damage in that it fails to disclose the cost of removing the ore the plaintiffs claim they were deprived of mining or the number of men it would have been necessary to employ to remove it or how many of the partners or alleged partners, or the labor of how many of the partners or alleged partners would be required to remove it or the cost of the mining, would have been.

And for the further reason that the evidence wholly fails to disclose that the partnership as a mining partnership or otherwise, collectively or individually was ready, willing and able to perform its part of the contract alleged or would have performed it as a mining partnership or as individuals had they not been interrupted by the acts of the agent of the company.

The COURT.—The motion of the defendant is granted as to the second count in the complaint, and the jury will be instructed to find for the defendant on the second count.

As to the first count, the motion is denied.

Mr. WALKER.—Note an exception to the ruling of the Court.

Mr. TYVAND.—We ask for an exception. [181]

The foregoing is all of the testimony and evidence introduced upon the trial of said cause, and thereafter, and after arguments of counsel, the jury were by the Court instructed as follows:

INSTRUCTIONS OF COURT TO THE JURY.

The COURT.—Gentlemen of the Jury: We now come to the close of this case, at least nearly so. You have heard the evidence and the arguments of counsel, and again, as heretofore, it becomes the duty of the Court to deliver its instructions, and those, as you know, relate more especially to the law than the facts, although sometimes in the Federal Court the Judge comments on the facts; however that may be, you are the sole judges of the facts, and whatever comments the Court might make so far as the facts are concerned, you are at liberty to disregard, if you see fit to do so, unless you should find something therein that might be of some assistance to you in arriving at your verdict. However, when it comes to the law, you accept the law from the Court. The Court might sometimes be in error, but, if so, a record is made of it and if either side wants to consider any error that may be committed they will have an opportunity to do so elsewhere to right the wrong. You accept the rules of law applicable to the case as laid down by the Court.

Now, gentlemen, in this case, which is a civil case, as you know, pleadings have been filed, complaint, answer and reply. [182] These pleadings, as in other cases, you will understand, are not to be accepted by you as any evidence whatsoever in the case. The complaint states the cause of action against the defendant; the defendant comes in and makes an answer, denying and setting up affirmative relief or otherwise, as the case may be. Now,

in this case you understand what is contended for; you understand what the controversy is about, and the Court at the beginning will give you a brief statement in concise terms.

Plaintiffs claim that they were wrongfully ousted and ejected from the enjoyment of mining privileges which they had acquired from the Crystal Copper Company, a foreign corporation, doing business in Silver Bow County, through the agency of one Alderson, in charge of and operating the Goldsmith mine, located north of Walkerville in said county, and which was being operated by the defendant under lease from the owners at the times alleged in the complaint. It is admitted that Alderson was the general manager and superintendent of the defendant company; at the times alleged plaintiffs claim that they were and at the times mentioned in the complaint were mining copartners in mines, subleasing from the defendant, and it is as mining copartnership recovery for the breach of contract is sought. Plaintiffs claim they entered into an oral lease with the defendant for a portion of the Goldsmith mine below the 500 foot level, along the course of the lead, within the end lines of the mine. It is alleged that the lease was a grant with exclusive right to possession of that portion of the lead covered in the alleged contract or lease under the alleged grant. The plaintiffs claim that they were given exclusive right to mine and remove any and all ores in the territory [183] referred to; that the defendant was to furnish the explosives, the tools, and timbers required for the operation and

to hoist and lower the plaintiffs, and the ores they might furnish; and all ores shipped by the plaintiffs under their alleged sublease they were to receive a portion of the net proceeds from the smelter returns after deductions for shipping charges and certain royalties were paid. Plaintiffs claim that under the lease they entered into the mine and performed certain work and labor and mined ores which they shipped and payment therefor made to them. It is contended that from the 26th day of June, 1921, until the 16th day of January, 1922, the plaintiffs worked continuously under their sublease, and on the latter date finally arbitrarily were ejected from the property without cause, and from then on the defendant arbitrarily refused to permit the plaintiffs without cause to go on with the alleged sublease and arbitrarily canceled and rescinded same without cause, and that plaintiffs were able, ready and willing to go on with the lease had they been permitted to do so by the defendant. It is claimed that there were certain ore bodies covered by the lease which plaintiffs were prevented from mining, and would have mined under the terms of their alleged lease had they been permitted so to do; it is contended that they would have realized certain profits had the lease not been canceled. It is for the recovery of the alleged prospective profits the first cause of action contemplates. All the foregoing contentions of plaintiffs are put in issue by the denials in defendant's answer. Now, in order to get at the very meat of the controversy, I will read to you commencing with the 14th paragraph

of plaintiffs' complaint, in order that you may have in mind the exact allegations [184] as to damages: "That there were about one thousand tons of ore averaging seventy ounces of silver per ton, and eleven dollars in gold per ton, or of the value of $81.00 per ton in the vein of ore on the hanging-wall side of said lead between the bottom of said winze and the 500 foot level of said mine, and the east and west line of said mine, yet to be mined on said date, January 16, 1922, that could and would have been mined by said plaintiffs and lessees within thirty days from and after the said 16th day of January, 1922, if the said defendant had not interfered with the said plaintiffs and lessees and arbitrarily canceled and rescinded the said sublease without cause, that the said plaintiffs and lessees were and are entitled to under said lease to mine and ship to the smelter under the terms, conditions and royalties of the aforesaid sublease, and that these plaintiffs would have realized on said ore a net profit to themselves of $16.67 per ton, and that there were approximately one thousand tons of ore to be mined in the footwall of said lead between the bottom of said winze and the 500 foot level of said mine and the east and west lines of said mine, which could and would have been mined by said plaintiffs and lessees within a period of ninety days from and after the 16th day of January, 1922, if the said defendant had not interfered with said lessees and arbitrarily canceled and rescinded the said sublease without cause as aforesaid; that said plaintiffs and lessees were and are entitled under said sublease

to mine and ship to the smelter under the terms, conditions and royalties of the aforesaid sublease, which would have averaged about thirty-seven ounces of silver per ton and about seven dollars in gold per ton, or of the value of forty-two dollars per ton for said [185] ore, which said lessees could have mined at a net profit of $12.50 per ton to said plaintiffs under the terms and conditions of said sublease. That by reason of the said arbitrary cancellation and rescission of said sublease without cause and the arbitrary ejectment of the said plaintiffs, Lawrence Monzetti, Pete Gaido, and Batt Tamietti from said property by the defendant, without cause as aforesaid, and the arbitrary refusal of the defendant to permit the plaintiffs to go on with said sublease and enter in and upon the said property as aforesaid, without cause, the plaintiffs have been damaged in the sum of $22,166.67 *cents,* no part of which has been paid; that the cancellation of said sublease and the ejectment of the said plaintiffs, Lawrence Monzetti, Pete Gaido and Batt Tamietti from said property and the refusal as aforesaid of said defendant to permit plaintiffs to go on with said sublease was arbitrary on the part of said defendant and without cause. Wherefore plaintiffs demand judgment for the said amount."

Now, that will probably amount to a sufficient statement of what is before you for consideration. You will remember, gentlemen, that this case is different from a criminal case, where proof must be beyond reasonable doubt. In a case of this

kind, a civil case, suit for damages, you must be satisfied by proof which amounts to a preponderance of the evidence, as will hereafter be defined. A preponderance, meaning the greater weight of the testimony, for illustration, if for instance in your deliberations you come to a point where you feel that the evidence is about equally divided, if you are unable to determine, in such an instance there would be no [186] preponderance of the evidence, and you would be obliged to find for the defendant.

Now, in this case, as in other cases, you are the sole judges of the credibility of witnesses and the weight to be given testimony. You have an opportunity to see the witness upon the stand, you note his demeanor, his manner of giving testimony, you note whether he is frank and fair and candid, or whether he is evasive, whether he speaks in monosyllables, whether he appears to have any prejudice in the matter; you note what interest, if any, the witness has in the outcome of the case; you take into consideration all of these matters. A witness is presumed to speak the truth, but this presumption may be repelled by his manner of giving testimony, by evidence affecting his credibility, or by contradictory evidence, and you are the sole judges in that respect. If you believe that any witness wilfully testified falsely, on any material matter, you may reject his entire testimony unless you should find in some part corroboration in other testimony, or in any circumstance that may have developed during the trial of the case.

That is for you to say. You don't have to believe a witness simply because he tells you that a certain state of facts exists. What he says must appeal to your good judgment, your good common sense, in the light of all the other testimony and all the other circumstances in the case.

The court instructs the jury that if either party violated the contract, or failed to carry out or perform the conditions therein stated, then the other party would have a right of action for damages based on the breach of the contract. You are not bound to decide in conformity with the declarations of any number of witnesses who do not produce conviction in your [187] minds against a less number, or against a presumption, or other evidence satisfying your mind. That a witness false in one part of his testimony is to be distrusted in others. That the evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered would be viewed with distrust.

The Court instructs the jury that while the plaintiffs must prove their case by a preponderance of evidence, still the proof need not be direct evidence of persons who saw the occurrence sought to be proved, the facts may also be proved by circumstantial evidence, that is, by proof of circum-

stances, if any, such as could rise to a reasonable inference in the minds of the jury of the truth of the facts alleged and sought to be proved, provided such circumstances, together with all the evidence in the case constitutes a preponderance of the evidence. The Court instructs the jury by a preponderance of evidence is meant the greater weight. Preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a certain fact or state of facts. In determining upon which side the preponderance of evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several [188] statements, in view of all the other evidence, facts and circumstances proved on the trial, and from all these circumstances determine upon which side is the weight or preponderance of the evidence.

You are instructed that for the breach of an obligation arising from contract the measure of damages is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby or which in the ordinary course of business would be likely to result therefrom.

The Court further instructs the jury that if plaintiffs entered into a verbal lease and expended labor and time and took out ore and exposed other ore which they might have taken out, and were

then wrongfully dispossessed by the defendant, and part of the ore which they had mined was appropriated by the defendant, and they were prevented from extracting any more ore, then they were entitled to recover the portion which according to the contract would belong to plaintiffs of the ore which they had actually mined, and any damages which they might have sustained by reason of the termination of the lease before all the ores discovered had been mined and sold, providing plaintiffs were willing, ready and able so to perform their agreement. If you find from the evidence that the plaintiffs were able, willing and ready to mine certain ores that the defendant is alleged to have leased to plaintiffs, and that the defendant has prevented plaintiffs from mining said ores, the measure of damages to plaintiffs is the value of the ores that the plaintiffs have been prevented from mining, less the cost of mining, shipping and smelting the same, less the royalties from the net smelter returns [189] less the defendant's one-half of the net balance. In this action the plaintiffs seek recovery from the defendant upon the proposition that they secured from the defendant a grant in the shape of a mining lease, with the right and privilege of mining and extracting ores from the Goldsmith mine, located in Silver Bow County, Montana, and that after securing this lease and performing some work, labor and services thereunder the defendant through its general manager, one Matt W. Alderson, rescinded the contract and ousted the *defendant* from the property, whereby they were dam-

aged; that the damage consisted of loss of prospective profits, and in this connection the Court charges you that no damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin.

In this case the defendant admits that there is due, owing and unpaid to the plaintiff, Batt Tamietti, the sum of $11.43, and to the plaintiff, Pete Gaido a like amount, and the defendant, prior to the beginning of the trial herein has deposited the said sums, with accrued interest to date, amounting in all to $28.00, which deposit was made to the Clerk of this Court, and said sum is now in his hands for the use of the said plaintiffs, and has been by them refused; further than this the defendant denies liability to the plaintiffs, either as a partnership or individually; therefore, if you find from the evidence that the sum so deposited is an amount sufficient to cover all the plaintiffs may have coming to them from the defendant, you will return a verdict in this case in favor of the defendant and against the plaintiffs. [190]

In this case you are instructed that the plaintiffs seek recovery upon the proposition that they are a mining copartnership, and in this connection you are instructed that the plaintiffs, Frank Tamietti and John Pagleero have admitted that full settlement has been made to them, and that they have no claim in this litigation against the defendant; and you are further instructed that it is disclosed by the evidence in this case that the plaintiff, Lawrence Monzetti, was paid in full for all services performed

by him under the contract sued upon, and that he signed a release which is in evidence in this case, whereby he admitted full settlement had been received by him for and on account of any interest he may have had in the contract sued upon; hence, the three plaintiffs named are not entitled to recover anything against the defendant, and the sole remaining question for your consideration is whether, under the facts and the law as given to you by the Court the remaining plaintiffs, Pete Gaido and Batt Tamietti, are entitled to recover anything at all against the defendant, as copartners, each entitled to a one-fifth interest in the profits of the copartnership, unless in the case of the partner, Lawrence Monzetti, you believe he was unconscious at the time of signing the release and incapable of realizing the nature and consequence to himself of his act. The evidence in this case submitted by the plaintiffs disclose that three cars and no more of commercial ore was mined and shipped from the hanging-wall from the territory claimed by the plaintiffs under their alleged contract, and in this connection the Court instructs you that the plaintiffs would be entitled to recover damages, if at all, on the three cars of commercial ore so mined and shipped, only upon the net profits that would accrue to them [191] after deducting all expenses incident to mining the same, and the burden of proof rests upon the plaintiffs to prove by a preponderance of the evidence that the said ore could and would have been mined by them not at a loss, but at a profit to themselves, and if it

could and would have been mined at a profit, then the plaintiffs would be entitled to recover only two-fifths of such profits after deducting the cost of mining as indicated, unless you should find in the instance of Lawrence Monzetti, the condition mentioned at the conclusion of the last instruction as to whether he was conscious or unconscious at the time of signing the release in full.

The Court instructs you that in ascertaining whether or not the plaintiffs or any of them were damaged by breach of contract alleged, that no damages may be awarded which are not clearly ascertainable in both their nature and origin, that nothing may be left to speculation and conjecture, and the burden of proof in this case rests upon the plaintiffs to prove by a preponderance of all of the evidence that any ores which they were deprived of mining and would have mined had the contract not been rescinded could and would have been mined at a profit to them, and it is only for such profit that plaintiffs may recover; therefore, if you believe from the evidence that the plaintiffs have failed to establish whether any ores they may have been entitled to mine could have been mined at a profit to themselves or a substantial amount of such profit, then your verdict must be for the defendant.

If you find from a preponderance of the evidence that the agreement or lease was made as alleged, and that the defendant ousted plaintiffs from possession, as alleged, and that plaintiffs [192] had they continued under their lease, being willing and able so to continue, would have mined the ground at

a profit, you are instructed to find for plaintiffs in some amount; in other words, if you so find, plaintiffs would be entitled to at least nominal damages.

As provided by Section 8667 of the Montana Codes, for the breach of an obligation arising from contract the measure of damages except as otherwise expressly provided for in this Code is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom. And again, in Section 8668 of the same codes, damages must be certain. No damages can be recovered for breach of contract which are not clearly ascertainable in both their nature and their origin. The Supreme Court of this state holds it is elementary that competent evidence must be produced of all facts necessary to a recovery upon which the jury can base a reasonably reliable conclusion; nothing can be left to mere conjecture; actual damages only may accrue. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. Actual damages which will sustain a judgment must be established not by conjectures or unwarranted estimates of witnesses, but by facts upon which their existence is logically or likely inferred. Speculations, if any, because of estimates of witnesses are not a proper basis of recovery.

The jury are instructed to find for the defendant on the second count of the complaint, there being but slight evidence and that only by way of inference to sustain it, while opposed to it is the posi-

tive evidence uncontradicted that the sales [193] of stock of the defendant company was an individual transaction of Matt W. Alderson with plaintiffs, of personal shares belonging to himself.

Now, gentlemen, you have heard a very thorough discussion of the facts in this case, on both sides. It does not seem necessary at this time for the Court to recount those facts as discussed to you by counsel. You have heard the evidence. You have heard the claims of plaintiffs and the witnesses in the case, and the defense interposed on the other side, of how the work was performed in this mine and what was left. The Court will give you the exhibits that were introduced in evidence, and it is for you to determine, if you can, what amount of damages the plaintiffs are entitled to recover in this action, taking into account the claims of plaintiffs and the denials on the part of the defense, and as the Court has instructed you, you must find by a preponderance of evidence in order to find a verdict for the plaintiff. The Court has further instructed you as to the damages and how they must be ascertained, and that they must not be left to conjecture or speculation. That they must be certain of ascertainment.

It takes twelve of your number to agree on any verdict. You will select one of your number to act as foreman and he will sign your verdict when you agree. The Court will furnish you with the pleadings in the case, with forms of verdict, and the exhibits, and you will now retire to deliberate.

Any exceptions?

Mr. WALKER.—If the Court please, to the charge to the jury of the Court, counsel for the defense on behalf of the defense, [194] asks for a general exception and asks for a general and special exception for the failure of the Court to charge that the contract sued upon was a working agreement to be paid for by a share of the profits of the venture for which plaintiffs have already been paid. Second, that the Court erred in failure to charge that under the evidence plaintiffs are limited to recover, if at all, only nominal damages. Third, for the failure of the Court to instruct the jury to return a verdict in favor of the defendant and against the plaintiffs. For the further reason the Court erred in failure to instruct the jury that the contract between the parties, plaintiffs and defendant, was a license revocable at will, instead of a lease of ground for royalty. [195]

REQUESTED INSTRUCTIONS BY DEFENDANT.

Prior to delivering its charge and instructions to the jury the defendant, in writing, requested the Court to instruct the jury upon matters of law as follows, which requests were each and all refused by the Court and defendant's exception noted.

Gentlemen of the Jury:

In this case the plaintiffs claim that they entered into a contract or lease with the defendant corporation, Crystal Copper Company, whereby they were granted the exclusive right to mine certain territory embraced within the Goldsmith Mine located

in Silver Bow County, Montana. In this connection you are instructed that the contract sued upon is in all essential features a contract for labor to be performed and to be paid for by a share of the profits realized from such labor, and in this case it appears that the plaintiffs have been paid for all of the labor performed by them under said contract from the profits realized from the ores mined by them, save and except the sum of $11.43 due, owing and unpaid to the plaintiff Pete Gaido and a like sum to the plaintiff, Batt Tamietti, but these sums with accrued interest have been paid to the clerk of this court for the use of the said plaintiffs prior to the beginning of this trial; therefore, your verdict will be against the plaintiffs and in favor of the defendants.

NOT GIVEN.

(Signed) C. N. PRAY,
Judge.

Gentlemen of the Jury:

In this case if you find for the plaintiffs the Court instructs you that you may find for them no more than nominal damages which would include the $28.00 deposited with the Clerk of the Court in this case for the use and benefit of the plaintiffs, Batt Tamietti and Pete Gaido, together with such additional nominal sum as to you may seem just and meet in the [196] premises.

Nominal damages are distinguished from actual, substantial or compensatory damages and are given not as an equivalent for any wrong sustained but

in recognition of technical injury, and by way of declaring a right, and the amount of such damages must not exceed a trivial sum.

NOT GIVEN.

(Signed) C. N. PRAY,
Judge.

Gentlemen of the Jury:

In this case the Court instructs you as a matter of law that it does not appear from the evidence received in this case whether the plaintiffs could or would have prosecuted their alleged contract to completion at a profit to themselves, therefore your verdict will be for the defendant.

NOT GIVEN.

(Signed) C. N. PRAY,
Judge.

Gentlemen of the Jury:

In this case you will return a verdict against the plaintiffs and in favor of the defendant.

Thereupon, the jury retired to deliberate upon its verdict, and thereafter returned in open court with its verdict in words and figures, as follows, to wit:

(Title of Court and Cause.)

VERDICT.

We, the jury in the above-entitled court and action find our verdict in favor of the plaintiffs, Batt Tamietti, and Pete Gaido, and against the defendant and assess plaintiffs' damages in the sum of

Seven Hundred Seventy & 66/100 ($770.66) Dollars, each.

(Signed) M. V. CONROY,
Foreman. [197]

Thereafter the Court ordered judgment to be entered upon the verdict in favor of Batt Tamietti and Pete Gaido in the sum of Seven Hundred Seventy & 66/100 ($770.66) Dollars, each, besides costs of action.

Thereafter, and on the 6th day of December, 1924, judgment was duly and regularly entered on said verdict.

Thereafter, and on the 6th day of December, 1924, the defendant, upon request of counsel, was given thirty (30) days in addition to the time allowed by rule of court, within which to prepare, serve and file its proposed bill of exceptions herein.

And now, within the time allowed by rule and the orders of the Court, the defendant presents this its proposed bill of exceptions and prays that the same may be signed, settled and allowed.

Dated this 30th day of December, 1924.

WALKER & WALKER,
C. S. WAGNER,
Attorneys for Defendant,
Silver Bow Blk., Butte, Montana.

Service of the foregoing proposed bill of exceptions by copy admitted this 30th day of December, 1924.

H. A. TYVAND,
F. E. McCRACKEN,
Attorneys for Plaintiffs,
Silver Bow Blk., Butte, Montana.

This is to certify that the foregoing bill of exceptions tendered by the defendant, Crystal Copper Company, with the amendments proposed by plaintiffs annexed and filed Jan. 8, 1925, is true and correct in all particulars, and is hereby settled and allowed, and made a part of the record in this case.

Dated this 20th day of January, 1925.

CHARLES N. PRAY,
United States District Judge.

Filed Jan. 20, 1925. C. R. Garlow, Clerk. [198]

Thereafter, on January 20th, 1925, a prayer for reversal of judgment was filed herein, which prayer is in the words and figures as follows, to wit: [199]

In the District Court of the United States in and for the District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLEERO, and FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,

Defendant.

PRAYER FOR REVERSAL OF JUDGMENT.

To the Honorable, the Circuit Court of Appeals of the United States for the Ninth District:

Now comes the Crystal Copper Company, the

plaintiff in error, and prays for a reversal of the judgment of the District Court of the United States for the District of Montana, which judgment was made, rendered and entered in the above-entitled cause and in the office of the Clerk of the District Court of the United States for the District of Montana, on the 6th day of December, 1924, in favor of defendants in error, Batt Tamietti and Pete Gaido, in the sum of seven hundred seventy and 66/100 ($770.66) each, and against the Crystal Copper Company, the plaintiff in error.

C. S. WAGNER,
WALKER & WALKER,
Attorneys for Plaintiff in Error,
Silver Bow Blk., Butte, Montana.

Filed January 20th, 1925. C. R. Garlow, Clerk. [200]

Thereafter, on the 20th day of January, 1925, an assignment of errors was filed herein, which assignment of errors is in the words and figures as follows, to wit: [201]

In the District Court of the United States for the District of Montana.

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLEERO, and FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,

Defendant.

ASSIGNMENT OF ERRORS.

Now comes the plaintiff in error, the Crystal Copper Company, by Walker and Walker and C. S. Wagner, its attorneys, and in connection with its petition for a writ of error says that in the record, proceedings and in the final judgment, aforesaid, manifest error has intervened to the prejudice of the plaintiff in error, to wit:

I.

The Court erred in denying plaintiff in error's motion for a directed verdict at the close of all of the evidence in the case, which said motion is in words and figures, as follows:

The defendant now moves the Court to direct a verdict in favor of the defendant and against all of the plaintiffs on the grounds and reasons following:

First: There is a fatal variance between the allegations and the proof in this, that plaintiffs rely for a recovery upon the proposition as alleged in their complaint that the plaintiffs were and are a mining copartnership, engaged in mine subleasing [202] and subletting from the defendant Crystal Copper Company, whereas the proof affirmatively shows and discloses that the relationship of mining partners does not and never did exist between these parties in so far as their negotiations and work for the defendant was concerned, but that the proof affirmatively discloses that they were operating and working under a license and not a lease, and that their relationship was nothing more than that of a working agreement for a share of the profits.

There is a fatal variance because the parties, Lawrence Monzetti and the plaintiffs Pete Gaido and Batt Tamietti, if they have any cause of action at all against the defendant it would be as individuals for work, labor and services performed.

Next: That the evidence is insufficient in law to prove a mining copartnership between the plaintiffs in their relations with the defendant in this case. The evidence is insufficient to prove a lease between the plaintiffs and the defendants, and the evidence establishes if it establishes any contractual relationship at all, a contract embodying a license. The evidence is insufficient to establish a lease for the reason that a lease of the real property of a mining corporation may only be secured by compliance with the provisions of section 6004 of the Revised Codes of Montana, 1921, which requires affirmative approval of the stockholders and the board of directors.

Next: The evidence is insufficient to warrant a recovery by the plaintiffs or any of them, upon the theory that they are a mining copartnership because under the express provisions of section 8059 of the Revised Codes of Montana of 1921, the acts and deeds and things of a majority of the members of such partnership controls all acts of the partnership, and it affirmatively [203] appears in this case that a majority of the members of the so-called partnership have no interest in this litigation, and the same may not be maintained by a minority of the members.

Next: The evidence is wholly insufficient to prove any damages sustained by the plaintiffs or any of

them in the event the Court should hold that they were operating under a lease and not a license for the reason that the evidence pertaining to proof of prospective profits or damages by reason of the cancellation of the lease falls short of giving to the jury any tangible basis upon which to base any rational judgment as to damages, but that it would require speculation and conjecture to reach any verdict, and the same would be the result of mere guesswork having no foundation in the evidence in this case, particularly for the reason that there is no evidence showing or tending to show how long it would have required the plaintiffs to mine the ore in place which they contend they were deprived of mining, nor the cost of mining such ore nor the incidental expenses or work or labor necessary to prepare the ore for shipment, nor is there any evidence in this case showing what the ore if mined could have been smelted for, nor what proportion of the net profits of such ore proportionate of the net profits in dollars would accrue to the plaintiffs. There is no evidence before the Court showing what the market price of the metals contained in the ore and from which the plaintiffs would derive net proceeds was or would be.

Further, the contract contended for by the plaintiffs as alleged in their complaint is one void under the statute of frauds of the State of Montana, and the proof in this case discloses that the contract contended for in the complaint is not a lease but a working contract or license.

These matters being directed to the first count. [204]

As directed to all of the evidence and to both counts of the complaint, the evidence wholly fails to show any measure of damage in that it fails to disclose the cost of removing the ore the plaintiffs claim they were deprived of mining or the number of men it would have been necessary to employ to remove it or how many of the partners or alleged partners, or the labor of how many of the partners or alleged partners would be required to remove it or the cost of the mining, would have been.

And for the further reason that the evidence wholly fails to disclose that the partnership as a mining partnership or otherwise, collectively or individually was ready, willing and able to perform its part of the contract alleged or would have performed it as a mining partnership or as individuals had they not been interrupted by the acts of the agent of the company.

II.

The Court erred in refusing to instruct the jury upon matters of law as requested by the plaintiff in error, as follows:

Gentlemen of the Jury:

In this case the plaintiffs claim that they entered into a contract or lease with the defendant corporation, Crystal Copper Company, whereby they were granted the exclusive right to mine certain territory embraced within the Goldsmith Mine located in Silver Bow County, Montana. In this connection you are instructed that the contract sued upon is in all essential features a contract for labor to be performed and to be paid for by a share of the profits

realized from such labor, and in this case it appears that the plaintiffs have been paid for all of the labor performed by them under said [205] contract from the profits realized from the ores mined by them, save and except the sum of $11.43, due, owing and unpaid to the plaintiff Pete Gaido and a like sum to the plaintiff, Batt Tamietti, but these sums with accrued interest have been paid to the Clerk of the court for the use of the said plaintiffs prior to the beginning of this trial; therefore, your verdict will be against the plaintiffs and in favor of the defendants.

NOT GIVEN.

(Signed) C. N. PRAY,
Judge.

III.

The Court erred in refusing to instruct the jury upon matters of law as requested by the plaintiff in error, as follows:

Gentlemen of the Jury:

In this case if you find for the plaintiffs the Court instructs you that you may find for them no more than nominal damages which would include the $28.00 deposited with the Clerk of the court in this case for the use and benefit of the plaintiffs, Batt Tamietti and Pete Gaido, together with such additional nominal sum as to you may seem just and meet in the premises.

Nominal damages are distinguished from actual, substantial or compensatory damages and are given not as an equivalent for any wrong sustained but in recognition of technical injury, and by way of de-

claring a right, and the amount of such damages must not exceed a trivial sum.

NOT GIVEN.

(Signed) C. N. PRAY,
Judge. [206]

IV.

The Court erred in refusing to instruct the jury upon matters of law as requested by the plaintiff in error, as follows:

Gentlemen of the Jury:

In this case the Court instructs you as a matter of law that it does not appear from the evidence received in this case whether the plaintiffs could or would have prosecuted their alleged contract to completion at a profit to themselves, therefore your verdict will be for the defendant.

NOT GIVEN.

(Signed) C. N. PRAY,
Judge.

V.

The Court erred in refusing to instruct the jury upon matters of law requested by the plaintiff in error, as follows:

Gentlemen of the Jury:

In this case you will return a verdict against the plaintiffs and in favor of the defendant.

NOT GIVEN.

(Signed) C. N. PRAY,
Judge.

VI.

The Court erred in failing to instruct the jury upon matters of law as contained in the exceptions

of the plaintiff in error to the charge of the Court as follows:

"Mr. WALKER.—If the Court please, to the charge to the jury of the Court, counsel for the defense on behalf of the defense, asks for a general exception and asks for a general and special exception for the failure of the Court to charge that the contract sued upon was a working agreement to be paid for by a share of the profits of the venture for which plaintiffs have already been paid. Second, that the Court erred in [207] failure to charge that under the evidence plaintiffs are limited to recover, if at all, only nominal damages. Third, for the failure of the Court to instruct the jury to return a verdict in favor of the defendant and against the plaintiffs. For further reason the Court erred in failure to instruct the jury that the contract between the parties, plaintiffs and defendant, was a license revocable at will, instead of a lease of ground for royalty.

VII.

The verdict and judgment are contrary to law.

C. S. WAGNER,
WALKER & WALKER,
Attorneys for Plaintiff in Error.
Silver Bow Blk., Butte, Mont.

Filed Jan. 20, 1925. C. R. Garlow, Clerk.

Thereafter, on the 20th day of January, 1925, a petition for writ of error was filed herein, which said petition is in the words and figures, as follows, to wit: [208]

In the District Court of the United States, in and for the District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLEERO, and FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,

Defendant.

PETITION FOR WRIT OF ERROR.

To the Honorable CHARLES N. PRAY, Judge of said Court:

Now comes the Crystal Copper Company, the defendant above named, by Walker & Walker and C. S. Wagner, its attorneys, and feeling itself aggrieved by the final judgment of this court entered against it and in favor of Batt Tamietti and Pete Gaido in the sum of seven hundred seventy and 66/100 dollars each, on the 6th day of December, 1924, hereby prays that a writ of error may be allowed to it from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States for the District of

Montana, and in connection with this petition, petitioner herewith presents its assignment of errors.

Petitioner further prays that an order of supersedeas may be entered herein and pending the final disposition of the [209] cause, and that the amount of security may be fixed by the order allowing the writ of error.

WALKER & WALKER and
C. S. WAGNER,
Attorneys for Plaintiff in Error.
409 Silver Bow Blk., Butte, Montana.

Filed January 20, 1925. C. R. Garlow, Clerk.

Thereafter on January 20, 1925, order allowing writ of error was duly signed, filed and entered herein, which said order is in the words and figures as follows, to wit: [210]

In the District Court of the United States for the District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLEERO, and FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,

Defendant.

ORDER ALLOWING WRIT OF ERROR.

On reading the petition of the Crystal Copper Company, defendant above named, for writ of error and the assignment of errors, and upon due consideration of the record of said cause.

IT IS ORDERED that a writ of error be allowed from the United States Circuit Court of Appeals for the Ninth Circuit to United States District Court for the District of Montana as prayed for in said petition, and that said writ of error and citation thereon be issued, served and returned to the United States Circuit Court of Appeals for the Ninth Circuit in accordance with law, upon condition that the said petitioner and plaintiff in error, the Crystal Copper Company, give security in the sum of Two Thousand ($2000.00) Dollars, that the said plaintiff in error shall prosecute said writ of error to effect, and if said plaintiff in error fail to make its plea good shall answer to the defendants in error for all costs and damages that may be adjudged or decreed on account of said writ of error.

And the said plaintiff in error now presents a bond in the sum of Two Thousand ($2000,00) Dollars, with good [211] and sufficient surety. It is ORDERED that the same be and is hereby duly approved.

IN WITNESS WHEREOF, I have hereunto set my hand this *January* 20th day of January, 1925.

CHARLES N. PRAY,
Judge.

Filed January 20, 1925. C. R. Garlow, Clerk.

Thereafter, on January 20th, 1925, writ of error was filed herein, which said writ of error and answer of court thereto is hereto annexed and is as follows, to wit: [212]

In the District Court of the United States for the District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLEERO, and FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,

Defendant.

WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to the Honorable CHARLES N. PRAY, One of the Judges of the District Court of the United States for the District of Montana, Sitting at Butte, Montana, GREETING:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court of the United States for the District of Montana, at Butte, Montana, before you, at the October term, 1924, thereof, between Lawrence Monzetti, Pete Gaido, Batt Tamietti, John Pagleero and Frank Tamietti, plaintiffs

and Crystal Copper Company, a corporation, defendant, a manifest error hath happened to the great damage of the said the Crystal Copper Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment [213] be therein given, that then, under seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within 30 days from the date hereof, together with this writ, that the record and proceedings aforesaid being inspected the said United States Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States this 26th day of January, 1925.

CHARLES N. PRAY,
U. S. District Judge, Montana.

[Seal] Attest: C. R. GARLOW,
Clerk of the District Court of the United States for the District of Montana.

By C. G. Kegel,
Deputy Clerk.

Filed January 20th, 1925. C. R. Garlow, Clerk.

ANSWER OF THE COURT TO THE WRIT OF ERROR.

The answer of the Honorable, the District Judges of the United States, District of Montana, to the foregoing writ.

The record and proceedings whereof mention is made, with all things touching the same, I certify under the seal of said District Court, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed, as within I am commended.

By the Court.

[Seal] C. R. GARLOW,
Clerk.
By L. P. Polglase,
Deputy. [214]

[Endorsed]: No. 362. In the District Court of the United States for the District of Montana. Lawrence Monzetti, Pete Gaido, Batt Tamietti, John Pagleero, and Frank Tamietti, Plaintiffs, vs. Crystal Copper Company, a Corporation, Defendant. Writ of Error. Filed Jan. 20, 1925. C. R. Garlow, Clerk. By C. G. Kegel, Deputy. [215]

Thereafter, on January 23d, 1925, citation was filed herein, which citation is hereto annexed and is as follows, to wit: [216]

In the District Court of the United States for the District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLEERO, and FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,

Defendant.

CITATION ON WRIT OF ERROR.

United States of America,—ss.

To Batt Tamietti and Pete Gaido, and to Messrs. Tyvand & McCracken, Your Attorneys, GREETINGS:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, within thirty (30) days from the date of this writ, pursuant to a writ of error duly allowed by the District Court of Montana and filed in the clerk's office of said court at Butte, Montana, on the —— day of January, 1925, in a cause wherein the Crystal Copper Company, a corporation, the defendant above named, is plaintiff in error, and you, Batt Tamietti and Pete Gaido are plaintiffs in the above-entitled action and defendants in error, to show cause if any why the judgment rendered against the plaintiff in error as in the writ of

error mentioned should not be reversed, and why speedy justice should not be done to the plaintiffs in error in its behalf. [217]

WITNESS the Honorable CHARLES N. PRAY, Judge of the District Court of the United States in and for the District of Montana, this 20th day of January, 1925.

CHARLES N. PRAY,
District Judge.

[Seal] Attest: C. R. GARLOW,
Clerk.
By C. G. Kegel,
Deputy Clerk.

Service of the within citation and receipt of copy is hereby admitted this 22d day of January, 1925.

H. A. TYVAND and
F. E. McCRACKEN,
Attorneys for Defendant in Error,
Silver Bow Blk., Butte, Montana. [218]

[Endorsed]: No. 362. In the District Court of the United States for the District of Montana. Lawrence Monzetti, Pete Gaido, Batt Tamietti, John Pagleero, and Frank Tamietti, Plaintiffs, vs. Crystal Copper Company, a Corporation, Defendant. Citation. Filed January 23, 1925. C. R. Garlow, Clerk. By L. P. Polglase, Deputy Clerk. [219]

Thereafter, on Jan. 20, 1925, supersedeas bond was filed herein as follows, to wit:

(Title of Court and Cause.)

SUPERSEDEAS BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, Crystal Copper Company, a corporation, principal herein, and Fidelity & Deposit Company of Maryland, are held and firmly bound unto Batt Tamietti and Pete Gaido, in the full and just sum of Two Thousand ($2,000.00) Dollars, lawful money of the United States, to be paid to the said Batt Tamietti and Pete Gaido, their heirs, executors, administrators, successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of December, 1924.

WHEREAS, in the October term of the above-entitled court, in a suit pending in said court between Lawrence Monzetti, Pete Gaido, Batt Tamietti, John Pagleero and Frank Tamietti, plaintiffs, and Crystal Copper Company, defendant, judgment was rendered against the said defendant, Crystal Copper Company, and in favor of Batt Tamietti and Pete Gaido, two of the plaintiffs above named, in the sum of Seven Hundred Seventy and 66/100 ($770.66) Dollars each, and the said Crystal Copper Company, a corporation, defendant, has petitioned for a writ of error directed from the

United States Circuit Court of Appeals for the Ninth Circuit and citing and admonishing the said plaintiffs, Pete Gaido and Batt Tamietti, to be and appear in the United States Circuit Court of Appeals of the Ninth Circuit at San Francisco, [220] within thirty (30) days from and after the date of said citation;

NOW, the condition of the above obligation is such, that if the said plaintiffs in error, Crystal Copper Company, shall prosecute the said writ of error to effect and will pay the amount of said judgment and answer all damages and costs if it, the defendant, should fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

CRYSTAL COPPER COMPANY,
a Corporation. (Seal)
By THOMAS J. WALKER,
Its Attorney-in-Fact,
Principal.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By JOHN E. CORETTE,
Attorney-in-Fact.
J. S. HEILBRONNER,
Agent. (Seal)

The within and foregoing bond is hereby approved.

CHARLES N. PRAY,
United States District Judge.

O. K. as to amount.

H. A. TYVAND.

Filed Jan. 20, 1925. C. R. Garlow, Clerk. [221]

Thereafter, on Jan. 22, 1925, praecipe for transcript was filed as follows:

In the District Court of the United States in and for the District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLEERO, and FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,

Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-styled Court:

Please prepare transcript in the above-entitled case, returnable to the Circuit Court of Appeals of the United States for the Ninth Circuit, and include therein the following papers, matters and things:

Plaintiffs' amended complaint.

Defendant's answer to plaintiffs' amended complaint.

Plaintiffs' reply to defendant's answer.

The bill of exceptions including transcript of the testimony as settled and allowed by the Court.

The verdict of the jury,

The judgment on the verdict.

Orders and minute entries of the court had in respect to the trial of said cause.

Plaintiffs' petition for writ of error.

Plaintiffs' assignment of errors and prayer for reversal.

Order granting writ of error.

The writ of error.

Citation and return thereon.

The certificate of the clerk of the court certifying to the correctness of the transcript when so prepared.

Dated this 22d day of January, 1925.

WALKER & WALKER,
C. S. WAGNER,

Attorney for Plaintiff in Error, the Crystal Copper Company, Defendant Above Named, 409 Silver Bow Block, Butte, Montana.

Filed Jan. 22, 1925. C. R. Garlow, Clerk. [222]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk United States District Court in and for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 222 pages, numbered consecutively from 1 to 222 inclusive, is a full, true and correct transcript of the record and proceedings had in the within en-

titled cause, and of the whole thereof, required to be incorporated in said transcript by praecipe filed, as appears from the original records and files of said court in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation and writ of error issued in said cause.

I further certify that the costs of said transcript amount to the sum of Eighty-five and 10/100 Dollars ($85.10), and have been paid by the plaintiff in error.

WITNESS my hand and the seal of said court at Butte, Montana, this —— day of January, A. D. 1925.

[Seal] C. R. GARLOW,
Clerk.
L. P. Polglase,
Deputy. [223]

[Endorsed]: No. 4486. United States Circuit Court of Appeals for the Ninth Circuit. Crystal Copper Company, a Corporation, Plaintiff in Error, vs. Pete Gaido and Batt Tamietti, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed February 3, 1925.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Paul P. O'Brien,
Deputy Clerk.

No. 4486

United States

Circuit Court of Appeals

For the Ninth Circuit.

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLEERO, and FRANK TAMIETTI,

Cross-Plaintiffs in Error,

vs.

CRYSTAL COPPER COMPANY, a Corporation,

Cross-Defendant in Error.

Transcript of Record.

Upon Cross Writ of Error to the United States District Court of the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4486

United States

Circuit Court of Appeals

For the Ninth Circuit.

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLEERO, and FRANK TAMIETTI,

Cross-Plaintiffs in Error,

vs.

CRYSTAL COPPER COMPANY, a Corporation,

Cross-Defendant in Error.

Transcript of Record.

Upon Cross Writ of Error to the United States District Court of the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

H. A. TYVAND, Butte, Montana,

F. E. McCRACKEN, Butte, Montana,
Attorneys for Plaintiff in Error.

Messrs. WALKER and WALKER, Butte, Montana,

C. S. WAGNER, Butte, Montana,
Attorneys for Defendant in Error.

In the District Court of the United States, in and for the District of Montana.

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLEERO, and FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,

Defendant.

BE IT REMEMBERED, that on the 12th day of February, 1925, petition for cross writ of error was filed herein, which said petition is in the words and figures, as follows, to wit: [1*]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, in and for the District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLEERO, and FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,

Defendant.

PETITION FOR CROSS WRIT OF ERROR.

To the Honorable CHARLES N. PRAY, Judge of said Court:

Now come the plaintiffs Batt Tamietti and Pete Gaido by H. A. Tyvand and F. E. McCracken, Esqs., their attorneys, and feeling themselves aggrieved by the final judgment of this court entered against the said defendant, and in favor of the said Batt Tamietti and Pete Gaido in the sum of Seven Hundred Seventy and 66/100 Dollars ($770.66) each, on the 6th day of December, 1924, hereby pray that a cross writ of error may be allowed to them from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States for the District of Montana, and in connection with this petition, petitioners herewith present their assignment of errors.

Wherefore, the said plaintiffs Batt Tamietti and Pete Gaido pray that a cross writ of error from

the judgment of the above-entitled court entered on the 6th day of December, 1924, as aforesaid, may issue in their behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, and for the correction of the errors so complained of; that said judgment be reversed and said action be remanded for a new trial; that this petition for a cross writ of error, Plaintiffs Batt Tamietti and Pete Gaido's assignment of errors, their prayer for reversal, the order allowing a cross writ of error herein, the requested cross writ of error, the citation under the cross writ of error herein and any other papers and records herein necessary to complete the petitioners' transcript to be filed in [2] the said Circuit Court, be added to said defendant's transcript of the records, proceedings and papers upon which judgment herein was rendered and entered, duly authenticated and forwarded to the United States Circuit Court of Appeals of the Ninth Circuit on January 30th, 1925, under a writ of error, for the consideration of the said petitioners' cross writ of error, and may be presented to the United States Circuit Court of Appeals of the Ninth Circuit and that such other and further proceedings may be had as are meet and proper in the premises.

H. A. TYVAND and
F. E. McCRACKEN,
Attorneys for Plaintiffs Batt Tamietti and Pete Gaido.

Filed February 12, 1925. C. R. Garlow, Clerk.

Thereafter, to wit, on the 12th day of February, 1925, assignment of errors was filed herein, which said assignment of errors is in the words and figures as follows, to wit: [3]

In the District Court of the United States in and for the District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLEERO, and FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,

Defendant.

ASSIGNMENT OF ERRORS UNDER CROSS WRIT OF ERROR.

Now come plaintiffs, Batt Tamietti and Pete Gaido, by their attorneys, H. A. Tyvand and F. E. McCracken, Esqs., and in this connection with their petition for writ of error say that in the record, proceedings and in the final judgment, aforesaid, manifest error has intervened to the prejudice of said plaintiffs, to wit:

I.

The Court erred in overruling plaintiffs' objection to the testimony given by the witness Lawrence Monzetti and the offer in evidence of Defendant's Exhibits "J," "K," "L," "M," and "N," as follows:

"This is my signature on Defendant's Exhibit 'J.' That is my name on the front, this is my name on the front of Defendant's Exhibit 'L.' That is my name on the back; this is my name on Defendant's Exhibit 'K'; that is my signature on Defendant's Exhibit 'M,' and that is my name on the front.

"Mr. WALKER.—If the Court please, we now offer in evidence Defendant's Exhibits 'J,' 'K,' 'L,' 'M,' and 'N.'

"Mr. McCRACKEN.—Plaintiffs object to the introduction of exhibit 'J,' upon the grounds and for the reasons that the same is irrelevant and immaterial and not within the issues of this case, furthermore the same does not prove or tend to prove any of the issues of this case.

"The COURT.—The objection is overruled.

"Exception.

"Mr. McCRACKEN.—Plaintiffs object to the introduction of exhibit 'K,' upon the grounds and for the reasons that the same is irrelevant and immaterial and not within the issues of this case, furthermore [4] the same does not prove or tend to prove any of the issues of this case, also it fails to show any consideration for any pretended release as to the 300 shares of stock claimed by Monzetti, as he received nothing more than that which he had coming at that time.

"The COURT.—The objection is overruled.

"Exception.

"Mr. McCRACKEN.—Let the record show that plaintiffs make the same objection to exhibit 'L' as plaintiffs made to exhibits 'J' and 'K.'

"The COURT.—Let the record so show and that the objection is overruled.

"Exception.

"Mr. McCRACKEN.—Plaintiffs make the same objection to exhibit 'M' as made to exhibits 'J,' 'K,' and 'L.'

"The COURT.—Let the record show same objection and that the objection is overruled.

"Exception.

"Mr. McCRACKEN.—Plaintiffs object to the introduction of exhibit 'N,' upon the grounds and for the reasons that the same is irrelevant and immaterial and not within the issues of this case, furthermore the same does not prove or tend to prove any of the issues of this case, also it fails to show any consideration for any pretended release by Monzetti as he received nothing more than that which he had coming at that time.

"The COURT.—The objection is overruled.

"Exception.

"(Documents received in evidence, marked Defendant's Exhibits 'J,' 'K,' 'L,' 'M,' and 'N,' and are as follows:)

"DEFENDANT'S EXHIBIT 'J.'

No. 53.

Butte, Montana, March 4, 1922.

Pay to the order of Lawrence Monsanti $100.00—One Hundred and no/100—Dollars.

MATT W. ALDERSON.

To W. A. Clark & Brother,
93–1 Bankers 93–1,
Butte, Montana.

(Endorsed across face:) [5]

W. A. Clark & Brothers, Bankers.
Paid
Mar. 6, 1922.
Butte, Montana.

(Endorsements on the back of above exhibit:)
Lawrence Mansanti. Paid.
Filed Dec. 15, 1924. C. R. Garlow, Clerk."

"DEFENDANT'S EXHIBIT 'K.'

Butte, Mont., Mar. 4, 1922.

Received of Matt W. Alderson One Hundred Dollars in full for my 200 shares of stock in the Crystal Copper Co. and for any real or implied right which I may have for the purchase of 300 shares additional.

LAWRENCE MOZETTI.

Witness:

_____.

Filed Dec. 15, 1924. C. R. Garlow, Clerk."

"DEFENDANT'S EXHIBIT 'L.'

Crystal Copper Co.

No. 7827.

Butte, Montana, March 4, 1922.

Pay to the order of Lawrence Monsanti—$11.43 —Eleven & 43/100 Dollars.

CRYSTAL COPPER CO.

(9) By Matt W. Alderson.

To the First National Bank of Butte, Montana. 93–2.

(Endorsements on the back of above exhibit:)

This check is issued in payment for services of for bill rendered to Mar. 4, 1922, for his part of Car 58763. If incorrect do not endorse but return to have matter made right. Endorsement and cashing means its acceptance in full.

LAWRENCE MANSANTI.

Paid: 3–6–22.

Filed Dec. 15, 1924. C. R. Garlow, Clerk."

"DEFENDANT'S EXHIBIT 'M.'

Crystal Copper Co.

No. 7687.

Butte, Montana, Feb. 1, 1922.

Pay to the order of Lawrence Mansanti—$80.85 —Eighty & 85/100 Dollars.

CRYSTAL COPPER CO.

(9) By Matt W. Alderson.

To The First National Bank, Butte, Montana 93–2.

(Endorsements on back of above exhibit:)

This check is issued in payment for services or for bill rendered to Jan. 31, 1922, or for his part lot 5–E, B. If incorrect do not endorse [6] but return to have matter made right. Endorsement and cashing means its acceptance in full.

LAWRENCE MANSANTI.

Paid 2–1–22.

Filed Dec. 15, 1924. C. R. Garlow, Clerk."

"DEFENDANT'S EXHIBIT 'N.'

Butte, Montana, March 4th, 1922.

Received of the Crystal Copper Company, a corporation, of Butte, Montana, the sum of Eleven & 43/100 Dollars, being my proportionate share in all ores shipped in the name of the Crystal Copper Company, a corporation, by me, as a copartner with others with whom I was interested in a certain lease.

This payment is acknowledged by me as full and complete settlement and satisfaction of any and all claim or claims that I may have against the said Crystal Copper Company, and as full and complete satisfaction of any and all demands that I may have against the Crystal Copper Company, the corporation aforesaid.

LAWRENCE MOSETTI.

Witness:

MATT ALDERSON.

Filed Dec. 15, 1924. C. R. Garlow, Clerk."

II.

The Court erred in denying plaintiffs' motion to strike from the evidence certain evidence, to wit:

"Mr. McCRACKEN.—If the Court please, plaintiffs move the Court to strike from the evidence Defendant's Exhibit 'J,' upon the grounds and for the reasons that the same is irrelevant, that no consideration has been shown for the same, as Monzetti received nothing more than that which he had coming at that time, furthermore, the signature was obtained at a time Monzetti was incompetent to act and did not know what he was doing, furthermore, he was unable to read or write, also it does not prove or tend to prove any of the issues in this case as no release was plead in the answer.

"The COURT.—The motion will be denied.

"Exception."

III.

The Court erred in denying plaintiffs' motion to strike from the evidence certain evidence, to wit: [7]

"Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit 'K,' as was made to exhibit 'J.'

"The COURT.—Let the record show the same motion as to Defendant's Exhibit 'K,' and that the motion is denied.

"Exception."

IV.

The Court erred in denying plaintiffs' motion to strike from the evidence Defendant's Exhibit "L," which motion is as follows:

"Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit 'L,' as was made to exhibits 'J' and 'K.'

"The COURT.—Let the record show the same motion as to Defendant's Exhibit 'L,' and that the motion is denied.

"Exception."

V.

The Court erred in denying plaintiffs' motion to strike from the evidence Defendant's Exhibit "M," which motion is as follows:

"Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit 'M,' as was made to exhibits 'J,' 'K,' 'L.'

"The COURT.—Let the record show the same motion as to Defendant's Exhibit 'M,' and that the motion is denied.

"Exception."

VI.

The Court erred in denying plaintiffs' motion to strike from the evidence Defendant's Exhibit "N," which motion is as follows:

"Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit 'N,' as was made to exhibits 'J,' 'K,' 'L,' 'M.'

"The COURT.—Let the record show the same motion as to Defendant's Exhibit 'N,' and that the motion is denied.

"Exception." [8]

VIII.

The Court erred in granting defendant's motion for a directed verdict at the close of all the evidence in the case as to the second cause of action contained in the amended complaint in this action; which motion is in words and figures, as follows:

The defendant now moves the Court to direct a verdict in favor of the defendant and against the plaintiffs on the grounds and reasons following:

First: There is a fatal variance between the allegation and the proof in this, that plaintiffs rely for a recovery upon the proposition as alleged in their complaint that the plaintiffs were and are a mining copartnership, engaged in mine subleasing and subletting from the defendant Crystal Copper Company, whereas the proof affirmatively shows and discloses that the relationship of mining partners does not and never did exist between these parties in so far as their negotiations and work for the defendant was concerned, but that the proof affirmatively discloses that they were operating and working under a license and not a lease, and that their relationship was nothing more than that of a working agreement for a share of the profits.

There is a fatal variance because the parties Lawreince Monzetti and Batt—the plaintiffs Pete Gaido and Batt Tamietti, if they have any cause of action at all against the defendant it would be as individuals for work, labor and services performed.

Next: That the evidence is insufficient in law to prove a mining copartnership between the plaintiffs in their relations with the defendant in this case. The evidence is insufficient to prove a lease between the plaintiffs and the defendant, and the evidence establishes if it establishes any contractual relationship at all, a contract embodying

a license. The evidence is insufficient to establish a lease for the reason that a lease of *a* the real property of a mining corporation may only be secured by compliance with the provisions of section 6004 of the Revised Codes of Montana, 1921, which requires affirmative approval of the stockholders and the board of directors.

Next: The evidence is insufficient to warrant a recovery by the [9] plaintiffs or any of them, upon the theory that they are a mining copartnership because under the express provisions of section 8059 of the Revised Codes of Montana of 1921, the acts and deeds and things of a majority of the members of such partnership controls all acts of the partnership, and it affirmatively appears in this case that a majority of the members of the so-called partnership have no interest in this litigation, and the same may not be maintained by a minority of the members.

Next: The evidence is wholly insufficient to prove any damages sustained by the plaintiffs or any of them in the event the Court should hold that they were operating under a lease and not a license for the reason that the evidence pertaining to proof of prospective profits or damages by reason of the cancellation of the lease falls short of giving to the jury any tangible basis upon which to base any rational judgment as to damages, but that it would require speculation and conjecture to reach any verdict, and the same would be the result of mere guesswork having no foundation in the evidence in this case, particularly for the reason

that there is no evidence showing or tending to show how long it would have required the plaintiffs to mine the ore in place which they contend they were deprived of mining, nor the cost of mining such ore nor the incidental expenses, or work or labor necessary to prepare the ore for shipment nor is there any evidence in this case showing that the ore if mined could have been smelted for, nor what proportion of the net profits of such ore proportionate of the net profits in dollars would accrue to plaintiffs. There is no evidence before the Court showing what the market price of the metals contained in the ore and from which the plaintiffs would derive net proceeds was or would be.

Further, the contract contended for by the plaintiffs as alleged in their complaint is one void under the statute of fraud of the State of Montana, and the proof in this case discloses that the contract contended for in the complaint is not a lease but a working contract or license.

These matters being directed to the first count.

Upon the second count we urge all of these matters and in addition [10] that plaintiffs may not recover under the second count under any theory of the case for the reason that it affirmatively appears from the evidence in this case that any stock transactions or transactions for the capital stock of the Crystal Copper Company were had with Matt W. Alderson as an individual; and not as a representative of the defendant company, and for the further reason that there is no evidence in

this case to prove any damages which plaintiffs sustained or might have sustained by reason of nondelivery on any stock to them to be earned in the future. That the measure of damages for breach of and agreement to sell personal property not paid for, is fixed by statute, particularly sections 8674 and 8700 of the Revised Codes of Montana of 1921. There is no evidence to show the measure of damages as fixed by these sections of the code, in that the evidence fails to disclose that the value of the property of the stock in question was the market price thereof and the price at which it might have been bought or its equivalent bought in the market nearest to the place where the stock should have been delivered or would have been delivered and put into the possession of the plaintiffs if entitled thereto at all at such time after the breach of duty upon which plaintiffs rights or the rights of any of the plaintiffs to damages accrued or within such time as would suffice with reasonable diligence for them to have been purchased the stock at the nearest or in the open market.

As directed to all of the evidence and to both counts of the complaint, the evidence wholly fails to show any measure of damage in that it fails to disclose the cost of removing the ore the plaintiffs claim they were deprived of mining or the number of men it would have been necessary to employ to remove it or how many of the partners or alleged partners, or the labor of how many of the partners

or alleged partners would be required to remove it or the cost of them mining, would have been.

And for the further reason that the evidence wholly fails to disclose that the partnership as a mining partnership or otherwise, collectively or individually was ready, willing and able to perform its part of the contract alleged or would have performed it as a mining [11] partnership or as individuals had they not been interrupted by the acts of the agent of the company.

The COURT.—The motion of the defendant is granted as to the second count in the complaint, and the jury will be instructed to find for the defendant on the second count.

As to the first count, the motion is denied.

Mr. WALKER.—Note an exception to the ruling of the Court.

Mr. TYVAND.—We ask for an exception.

VIII.

The Court erred in receiving the verdict which is, excepting the title of the court and cause, as follows:

"VERDICT.

We, the jury in the above-entitled court and action find our verdict in favor of the plaintiffs, Batt Tamietti and Pete Gaido, and against the defendant and assess plaintiffs' damages in the sum of Seven Hundred Seventy & 66/100 ($770.66) Dollars, each.

(Signed) M. V. CONROY,
Foreman."

And in entering judgment in accordance therewith.

H. A. TYVAND and
F. E. McCRACKEN,
Attorneys for Plaintiffs, Batt Tamietti and Pete Gaido.

Filed February 12, 1925. C. R. Garlow, Clerk.

Thereafter, on February 12, 1925, prayer for reversal under cross writ of error, was filed herein, which said prayer is in the words and figures as follows, to wit: [12]

In the District Court of the United States in and for the District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLEERO and FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,

Defendant.

PRAYER FOR REVERSAL UNDER CROSS WRIT OF ERROR.

Come now plaintiffs Batt Tamietti and Pete Gaido in the above-entitled action and pray that the judgment rendered and entered in favor of the said plaintiffs, Batt Tamietti and Pete Gaido,

for the sum of Seven Hundred Seventy & 66/100 ($770.66) Dollars each, on the 6th day of December, 1924, in the above-entitled court, shall be reversed and remanded for a new trial by the United States Circuit Court of Appeals for the Ninth Circuit, and

That such other and further orders as may be fit and proper in the premises may be made in the above-entitled cause by said Circuit Court of Appeals.

H. A. TYVAND and
F. E. McCRACKEN,
Attorneys for Plaintiffs, Batt Tamietti and Pete Gaido.

Filed February 12, 1925. C. R. Garlow, Clerk.

Thereafter, on February 12, 1925, order allowing cross writ of error was duly signed, filed and entered herein, which said order is in the words and figures as follows, to wit: [13]

In the District Court of the United States for the District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLEERO and FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,

Defendant.

ORDER ALLOWING CROSS WRIT OF ERROR.

On this 12th day of February, 1925, the plaintiffs, Batt Tamietti and Pete Gaido, by their attorneys, having filed herein, and presented to the Court their petition praying that a writ of error from the judgment of the above-entitled court rendered and entered in the above-entitled action on the 6th day of December, 1924, may issue in their behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors complained of in their petition and specifications of errors filed therewith, and an assignment of errors intended to be urged by them, and praying also that the said plaintiffs' petition for a writ of error, their assignment of errors, their requested writ of error, their prayer for reversal, this order allowing them a writ of error, their citation and any other papers filed herein necessary to complete the petitioners' transcript to be filed in the said Circuit Court of Appeals, be added to defendant's transcript of the records, proceedings and papers upon which judgment herein was rendered and entered, duly authenticated and forwarded to the Circuit Court of Appeals of the Ninth Circuit, January 30th, 1925, under a writ of error issued upon said defendant's petition for a writ of error, for the consideration of the said petitioners' cross writ of error, and may be presented to the United States Circuit Court of Appeals of the Ninth Circuit and that such other and further proceedings

may be had as are meet and proper in the premises.

IN CONSIDERATION WHEREOF, the Court hereby allows plaintiffs, Batt Tamietti and Pete Gaido a writ of error from the said judgment [14] of the District Court in the above-entitled case to the United States Circuit Court of Appeals of the Ninth Circuit upon the filing of a bond in the sum of $250.00 to be approved by the Court.

IT IS FURTHER ORDERED, that the transcript of record heretofore ordered to be filed in connection with said defendant's writ of error is to be used for the consideration of this cross writ of error, the plaintiffs herein, Batt Tamietti and Pete Gaido being only required to print the papers pertaining to this cross writ of error, to be added to such transcript.

Dated February 12th, 1925.

CHARLES N. PRAY,

Judge of the United States District Court in and for the District of Montana.

Filed February 12, 1925. C. R. Garlow, Clerk.

Thereafter, on February 19, 1925, stipulation waiving bond on cross writ of error was duly filed herein, which stipulation is in the words and figures as follows, to wit: [15]

In the District Court of the United States in and for the District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLEERO and FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,

Defendant.

STIPULATION WAIVING BOND ON CROSS WRIT OF ERROR.

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, that the bond required in the order allowing plaintiffs Batt Tamietti and Pete Gaido cross writ of error, in the sum of $250.00, made and entered on the 12th day of February, 1925, be waived by the parties hereto, and that the Court may make and enter a citation under said cross writ of error to the defendant, Crystal Copper Company, without said bond, and the said citation is to have the same force and effect as though said bond had been furnished and approved by said Court.

Dated this 16th day of February, 1925.

H. A. TYVAND and
F. E. McCRACKEN,
Attorneys for Plaintiffs Batt Tamietti and Pete Gaido.

WALKER & WALKER and
C. S. WAGNER,
Attorneys for Defendant Crystal Copper Company, a Corporation.

Filed February 19th, 1925. C. R. Garlow, Clerk.

Thereafter, on February 20th, 1925, cross writ of error was filed herein, which said cross writ of error and answer of court thereto is hereto annexed. [16]

In the District Court of the United States in and for the District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLEERO, and FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,

Defendant.

CROSS WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America to the Honorable CHARLES N. PRAY, one of the Judges of the District Court of the United States for the District of Montana, Sitting at Butte, Montana, GREETING:

BECAUSE, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court of the United States for the District of Montana, at Butte, Montana, before you, at the September term, 1924, thereof, between Lawrence Monzetti, Pete Gaido, Batt Tamietti, John Pagleero and Frank Tamietti, plaintiffs, and Crystal Copper Company, a corporation, defendant, manifest error hath happened to the great damage of the said plaintiffs as by the record herein appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same to United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within 30 days from the date hereof, together with this writ, that the record and proceedings aforesaid being inspected the said United States Circuit Court of

Appeals for [17] the Ninth Circuit may cause to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States of America, this 20th day of February, 1925.

[Seal] C. R. GARLOW,
Clerk of the District Court of the United States for the District of Montana.

By L. R. Polglase,
Deputy Clerk.

Service of the above and foregoing writ of error acknowledged and copy thereof received at Butte, Montana, this 20 day of February, 1925.

WALKER & WALKER,
C. S. WAGNER,
Attorneys for Plaintiff in Error, Crystal Copper Company, a Corporation.

ANSWER OF THE COURT TO CROSS WRIT OF ERROR.

The answer of the Honorable, the District Judge of the United States, District of Montana, to the foregoing writ.

The record and proceedings whereof mention is made, with all thing touching the same, I certify, under the seal of said District Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.
[Seal] C. R. GARLOW,
Clerk.
By L. R. Polglase,
Deputy. [18]

[Endorsed]: No. 362. In the District Court of the United States in and for the District of Montana, Lawrence Monzetti, Pete Gaido, Batt Tamietti, John Pagleero and Frank Tamietti, Plaintiffs, vs. Crystal Copper Company, a Corporation, Defendant. Cross Writ of Error. Filed Feb. 20, 1925. C. R. Garlow, Clerk. By L. R. Polglase, Deputy Clerk. [19]

Thereafter, on February 20th, 1925, citation was filed herein, which citation is hereto annexed, and is in the words and figures as follows, to wit: [20]

In the District Court of the United States in and for the District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLEERO and FRANK TAMIETTI,
Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,
Defendant.

CITATION UNDER CROSS WRIT OF ERROR.

United States of America,—ss.

The President of the United States to Crystal Copper Company, a Corporation, and to Messrs. Walker & Walker and C. S. Wagner, Its Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, California, within thirty (30) days from the date of this writ, pursuant to a cross writ of error duly allowed by the United States District Court for the District of Montana, on the 12th day of February, 1925, in a cause wherein the Crystal Copper Company, a corporation, the defendant above named is plaintiff in error, and the above-named plaintiffs, Batt Tamietti and Pete Gaido, are defendants in error, to show cause if any why the judgment rendered against the plaintiff in error as in the cross writ of error mentioned should not be reversed and remanded for a new trial, and why speedy justice should not be done to the defendants in error in their behalf.

WITNESS THE Honorable CHARLES N. PRAY, Judge of the District Court of the United

States in and for the District of Montana, this [21] 19th day of February, 1925.

CHARLES N. PRAY,
District Judge.

[Seal] Attest: C. R. GARLOW,
Clerk.
By L. R. Polglase,
Deputy Clerk.

Service of the within citation under cross writ of error acknowledged and copy thereof received at Butte, Montana, this 20th day of February, 1925.

WALKER & WALKER,
C. S. WAGNER,
Attorneys for Plaintiff in Error, Crystal Copper Company, a Corporation. [22]

[Endorsed]: No. 362. In the District Court of the United States for the District of Montana. Lawrence Monzetti, Pete Gaido, Batt Tamietti, John Pagleero and Frank Tamietti, Plaintiffs, vs. Crystal Copper Company, a Corporation, Defendant. Citation Under Cross Writ of Error. Filed Feb. 20, 1925. C. R. Garlow, Clerk. By L. R. Polglase, Deputy Clerk. [23]

Thereafter, on February 21st, 1925, praecipe for additions to transcript of record was duly filed herein, which praecipe is in the words and figures as follows, to wit: [24]

In the District Court of the United States in and for the District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLEERO and FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,

Defendant.

PRAECIPE OF DEFENDANTS IN ERROR FOR ADDITIONS TO TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You are hereby requested to make the following additions to the transcript of record, heretofore ordered to be filed in the United States Circuit Court of Appeals for the Ninth Circuit by the plaintiff in error, and to add thereto and file in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to a cross writ of error allowed in the above-entitled cause and to incorporate into such additional transcript of record the following and no other papers or exhibits, to wit:

1. Petition for cross writ of error.
2. Assignment of errors under cross writ of error.
3. Prayer for reversal under cross writ of error.
4. Order allowing cross writ of error.

5. Stipulation of parties to cause waiving bond on the cross writ of error.
6. Cross writ of error.
7. Citation under cross writ of error.
8. A copy of this praecipe.

And that the same be duly certified by you as required by law and the rules of the Court; and that you further state in your certificate under seal, cost of the additions to the record and by whom paid.

H. A. TYVAND and
F. E. McCRACKEN,

Attorneys for Defendants in Error, Batt Tamietti and Pete Gaido. [25]

Service of the foregoing praecipe of defendants in error for additions to transcript of record acknowledged and copy thereof received this 21st day of February, 1925.

WALKER & WALKER and
C. S. WAGNER,

Attorneys for Plaintiff in Error, Crystal Copper Company, a Corporation.

Filed February 21, 1925. C. R. Garlow, Clerk. [26]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby

certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 27 pages, numbered consecutively from one to twenty-seven, inclusive, is a true and correct transcript of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel as shown herein, as appears from the original files and records of said court in my custody and control; and I do further certify and return that I have annexed to said transcript, and included within said paging the original citation and cross writ of error.

I further certify that the costs of the transcript of record is the sum of Nine and 50/100 Dollars ($9.50), and that the same has been paid.

Witness my hand and the seal of said court at Butte, Montana, this 27th day of February, A. D. 1925.

[Seal] C. R. GARLOW,
Clerk.
By L. R. Polglase,
Deputy. [27]

[Endorsed]: No. 4486. United States Circuit Court of Appeals for the Ninth Circuit. Lawrence Monzetti, Pete Gaido, Batt Tamietti, John Pagleero and Frank Tamietti, Cross-Plaintiffs in Error, vs. Crystal Copper Company, a Corporation, Cross-Defendant in Error. Transcript of Record.

Upon Cross Writ of Error to the United States District Court of the District of Montana.

Filed March 3, 1925.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH DISTRICT

CRYSTAL COPPER COMPANY,
a Corporation,
Plaintiff in Error,

vs.

PETE GAIDO and BATT TAMIETTI,
Defendants in Error.

PLAINTIFF IN ERROR'S BRIEF

WALKER & WALKER, C. S. WAGNER,
409 Silver Bow Block, Butte, Montana.
Attorneys for Plaintiff in Error

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH DISTRICT

CRYSTAL COPPER COMPANY,
a Corporation,
Plaintiff in Error,

vs.

PETE GAIDO and BATT TAMIETTI,
Defendants in Error.

PLAINTIFF IN ERROR'S BRIEF

Upon Writ of Error to the United States District Court of the District of Montana.

STATEMENT OF THE CASE

The defendants in error, and three others, claiming to be a mining co-partnership, brought action against the plaintiff in error for damages for

breach of an alleged mining lease, the specific allegation as to their status is:

> "That the plaintiffs, Lawrence Monzetti, Pete Gaido, Batt Tamietti, John Pagleero and Frank Tamietti, are, and at all times herein mentioned were, mining co-partners in mine, subleasing from said defendant.' '
> (Tr. p. 5, paragraph 5.)

Trial was had to the court sitting with a jury, resulting in a verdict in favor of the defendants in error, Tamietti and Gaido, in the sum of seven hundred seventy and 66/100 ($770.66) dollars each (Tr. 40), upon which judgment was duly given and made (Tr. 41), to reverse which this writ of error is prosecuted.

To obviate confusion, we will, in this statement, designate and refer to the parties as they were treated, and as they appeared in the trial court.

The amended complaint (Tr. 2.) discloses that defendant, Crystal Copper Company, is a corporation organized under the laws of the state of Maine, engaged in mining ores in quartz mine known as the "Goldsmith Mine,' located in Silver Bow County, Montana, and which mine extends in an easterly and westerly direction of about fifteen hundred feet, and in a northerly and southerly direction of about six huundred feet; that there was a level therein designated as the five hundred foot level, and a shaft commonly known as "Shaft No. 1,"

which was the only shaft used to hoist and lower men working in the mine, and to lower timber, hoist ore and lower other supplies used in connection with the operation of the mine, and said shaft was in the possession of and under the charge and control of the defendant; that there was a lead at and below the five hundred foot level running in an easterly and westerly direction, known as the "North Lead," in which, in a northwesterly direction from the shaft referred to, there was a winze about thirty-five feet deep from and under said five hundred foot level; that defendant had full power and authority, as lessee, of said mine, to sub-lease and to grant to miners any of the ores in any part or portion of the mine, with the right in the miners to the exclusive possession and exclusive right to work said parts or portion of the mine as they were granted by the defendant (Tr. 4, Par. 3); that one Matt W. Alderson was the agent and manager of the defendant with full power, authority, charge, control, superintendency and management of the mine for the company, and with full power and authority from the company to sub-lease and grant to miners all the ores in any part or portion of the mine with the right in said miners to the exclusive possession and exclusive right to work such parts or portions of the mine as were granted by the defendant (Tr. p. 4, par. 4).

That about the 26th day of June, 1921, the five plaintiffs named in the complaint entered into an oral lease with the defendant for a certain portion of said mine, to wit: Fifty feet downward in said north lead from and under the five hundred foot level of the mine, approximately one thousand feet in a northwesterly direction from said shaft and easterly along the lead to the east from under the five hundred foot level, approximately one hundred feet in a northwesterly direction from the shaft and easterly along said lead to the east boundary line of the mine, and westerly to the west boundary line of the mine, the terms being that plaintiffs were to enter into and upon the property and commence work and continue to work in the winze and sink it to a depth of about fifty feet and search for marketable ores.

That in consideration of the work to be performed by plaintiffs the defendant granted to plainaiffs the exclusive right of possession of the winze, and any drifts, cross-cuts and stopes from it which plaintiffs would make in that portion of the mine, and granted the plaintiffs all the commercial ores they would discover in the winze to the depth of fifty feet, and all commercial ores discovered in any and all drifts, cross-cuts and stopes from the winze to the depth of fifty feet within the boundary lines of the mine, and up to the five hundred foot level of the mine, with the exclusive right to

mine and remove any and all ores discovered by the plaintiffs from the winze, and any drifts, cross-cuts and stopes the plaintiffs would make in the above described portion of the mine, and the defendant was to furnish all explosives, all tools and timber needed without charge to the plaintiffs, and to hoist and lower plaintiffs and their servants whenever necessary; to hoist waste and ore which plaintiffs delivered to the shaft on the five hundred foot level in the mine in full carloads from the winze, drifts, cross-cuts and stopes without charge to plaintiff, outside of certain royalties to be paid the defendant as consideration for the allotted lease (Tr. 5, par. 7).

It is then alleged that four of the plaintiffs entered the mine about the 26th day of June, 1921, and commenced work under the alleged contract (Tr. 7, par. 8). Paragraph nine sets forth that after the plaintiffs had discovered a commercial vein of ore, about July 20, 1921, the defendant orally agreed with them to grant, and did grant, an extension of territory to the plaintiffs to be mined by them in consideration that they sink the winze to a deeper depth, and they would then have the exclusive right to all ores they discovered between the bottom of the winze when sunk to a deeper depth up to the five hundred foot level, and within the boundary lines of the mine upon the same terms, conditions and royalties as contained

in the original lease. When this extension was made the other alleged partner, having been ill, joined the alleged partnership, and commenced working the lease with them (par. 7, par. 10).

The eleventh paragraph (Tr. 8) alleges that the plaintiffs, about July 20th, 1920, commenced sinking the said winze to a deeper depth than fifty feet until they had reached a depth of about seventy-five feet, when they struck a fault, whereby they sank a sump into the winze, and then drifted east and west from the winze on the vein for a distance of about one hundred feet east, until they came to a point where the vein ceased to be of commercial value, that they then returned to the winze and commenced breaking and stoping ore and stoped up to twenty feet east from the winze, when they were again granted an extension by the defendant for additional territory with the exclusive right to mine all ores they would discover by crossing from the north into the footwall of the lead between the boundary lines of the mine and the bottom of the winze and level of the mine, and would get exclusive possession upon the same terms, conditions and royalties as contained in the original agreement. That plaintiffs then commenced cross-cutting from the bottom of the drift into the footwall of the lead, and cross-cutted about fifteen feet into another vein in the same lead, and struck rich and valuable ore, naming the assays and the size of the vein (Tr. 8, par. 11).

It is then alleged (Tr. 9, par. 12) that in accordance with their agreement they shipped ten cars of ore between the 10th day of August, 1921, and the 31st day of March, 1922; that plaintiffs and defendants had made full settlement of the first eight cars of ore shipped, and that the defendant thereby ratified the terms and conditions of the contract; that on the 31st day of January, 1922, the defendant received smelter returns in settlement of the ninth car that was shipped; that on or about the 3rd day of March, 1922, defendant received smelter returns and settlement on the tenth car that was shipped; that certain sums were withheld by the defendant from the plaintiffs for the payment of stock of the defendant company theretofore purchased from the defendant, which defendant neglected and refused to deliver to plaintiffs, and claimed that there was a balance of $22.86 due, owing and unpaid the plaintiffs by the defendant upon the ninth and tenth cars of ore shipped by plaintiffs to the smelter under said lease.

The thirteenth paragraph alleges in substance that four of the partners worked continuously under their contract and its extensions from the 26th day of June, 1921, until the 16th day of January, 1922, and that the fifth partner worked continuously from the 20th day of July, 1921, to the 16th

day of January, 1922, on which date the defendant arbitrarily ejected the plaintiffs, Lawrence Monzetti, Pete Gaido and Batt Tamietti, without cause, and arbitrarily refused to permit them to go on under the contract, without cause, or to enter in or upon the property, and arbitrarily cancelled and rescinded the contract without cause. That plaintiffs were at all times able, ready and willing to go on with the work had they been permitted to do so by defendant (Tr. 10, par. 13).

It is then alleged (Tr. 11, par. 14):

> "That there were about 1000 tons of ore averaging 70 ounces of silver per ton and $11.00 in gold per ton, or of the value of $81.00 per ton, in the vein of ore on the hanging-wall side of said lead, between the bottom of said winze and the 500 foot level of said mine, and the east and west line of said mine yet to be mined on said date, January 16, 1922, that could and would have been mined by said plaintiffs and lessees within 30 days from and after the said sixteenth day of January, 1922, if the said defendant had not interferred with the said plaintiffs and lessees, and arbitrarily cancelled and rescinded the said sub-lease, without cause, that the said plaintiffs and lessees were and are entitled to under said sub-lease to mine and ship to the smelter under the terms, conditions and royalties of the aforesaid sub-lease, and that these plaintiffs would have realized on said ore a net profit to themselves of sixteen and 67/100 ($16.67) dollars per ton; and that there were approximately one thousand (1000) tons of ore to be mined in the foot wall of said lead

between the bottom of said winze and the 500 foot level of said mine, and the east and west lines of said mine, which could and would have been mined by said plaintiffs and lessees within a period of ninety days from and after the 16th day of January, 1922, if the said defendant had not interferred with said lessees and arbitrarily cancelled and rescinded the said sub-lease, without cause as aforesaid; that said plaintiffs and lessees were and are entitled under said sub-lease to mine and ship to the smelter under the terms, conditions and royalties of the aforesaid sub-lease, which would have averaged about 37 ounces of silver per ton and about $7.00 in gold per ton, or of the value of $42.00 per ton for said ore, which said lessees could have mined at a net profit of twelve and 50/100 ($12.50) dollars per ton to said plaintiffs under the terms and conditions of said sub-lease.

15.

That by reason of the said arbitrary cancellation and rescission of said sub-lease, without cause, and the arbitrary ejectment of the said plaintiffs, Lawrence Monzetti, Pete Gaido and Batt Tamietti, from said property by the defendant, without cause, as aforesaid, and the arbitrary refusal of the defendant to permit the plaintiffs to go on with said sub-lease and enter in and upon the said property as aforesaid, without cause, the plaintiffs have been damaged in the sum of twenty-two thousand one hundred sixty-six and 67/100 ($22,166.67) dollars, no part of (10) which has been paid; that the cancellation of said sub-lease and the ejectment of said plaintiffs, Lawrence Monzetti, Pete Gaido and Batt Tamietti, from said property and the refusal as aforesaid of said

> defendant to permit plaintiffs to go on with the said sub-lease was arbitrary on the part of the defendant, and without cause."

The prayer is for damages in the sum of $22,166.67.

There was a second alleged cause of action stated in complaint (Trans 13 et seq.) which is not before the court on this writ of error for the reason that at close of the trial a directed verdict on defendant's motion was granted the defendant thereon (Trans. 185).

By its answer the defendant admitted its corporate capacity, that it was operating the Goldsmith Mine; that Matt W. Alderson was its manager and superintendent.

As to the alleged contract the defendant plead affirmatively:

> "That said pretended contract was and is void under and by virtue of the provisions of paragraphs 1 to 5 of Section 7519. Section 7593 and Section 7939 of the Revised Codes of Montana of 1921."
>
> (Trans. 28, Paragraph 7).

The defendant admitted that at the time set forth in the complaint the plaintiffs or some of them performed some work in the mine and extraced ores therefrom. (Trans. 29, Par. 11); also that some ores were shipped from the mine which had been mined by plaintiffs or some of them, and that plaintiffs were fully paid for all work, labor and services performed by them, or any of them (Trans. 29 Par. 12).

All remaining issues of plaintiff's complaint were placed in issue by general and specific denials (Trans. 28-29).

Defendant's affirmative allegations were placed in issue by reply (Trans. 34).

Upon the issues as thus framed, the cause came on regularly for trial on the 3rd day of December, 1924 (Trans. 36).

At the outset, plaintiff objected to the introduction of testimony because the complaint does not state facts sufficient to constitute a cause of action (Trans. 48).

Batt Tamietti was the first witness sworn. Upon it being made apparent that Matt W. Alderson, plaintiff's manager, was dead, objection to the witness testifying as to transactions with a deceased agent of a corporation was made and overruled by the court (Tr. 50). Before the witness was permitted to testify as to the alleged contract further objections were made as follows:

> "At this time, may it please the court, we object on the ground and for the reason that the complaint in this case shows upon its face that the plaintiffs seek recovery upon an alleged oral lease entered into between themselves and the defendant corporation, through the instrumentality of an agent or general manager of the corporation, that therefore the complaint discloses that while the alleged contract is denominated as a lease, it is in law and under the allegations of the complaint a parol license to enter into and upon the Gold-

smith mine, for the purpose of working the same, and being a license rather than a lease the complaint fails to state facts sufficient to warrant a recovery, in that recovery is sought upon the basis of a prospective privilege or profits to be earned in the future, whereas, under the license they are limited to recovery, if recovery may be had at all, for ores actually removed from the place and mined. In other words, their recovery is limited to a share of the proceeds of personal property after removed from the mine. Further, we object to the testimony because the plaintiffs in this action seek a recovery upon the proposition that they are a mining partnership, having sued as a mining partnership, and under the laws of the state of Montana, their holding being that of licensees, there is no allegation in the complaint that they own the Goldsmith mine or acquired an interest in the Goldsmith mine itself, such as is required to constitute a mining partnership, and having undertaken to recover as a mining co-partnership, they may not recover in this action as individuals upon any theory. Further, we (45) object to any further testimony in this case, upon the ground that the complaint shows upon its face that the alleged contract was an oral contract, and is therefore void under the statute of frauds, particularly sections 7593, 7599, subdisivion 5, section 7939, all of the Civil Code, and sections 10611 and 10613 of the Code of Civil Procedure, all being sections of the Revised Codes of Montana of 1921. And we object, further, that the complaint shows upon its face that the alleged contract sued upon, though oral, is so vague, indefinite and uncertain in its terms as to be void and not enforecable, and that it would require the court

to make a contract for the parties in order to recover on any theory of the case.'

The court, after listening to argument upon this motion, reserved the points of law involved (Tr. 53), and permitted the witness to testify as to the terms of the contract, and his testimony as it appears in the record is, for the convenience of the court, here set out:

"On the 26th day of June, 1921, I heard from Mr. Frank Tamietti that Mr. Alderson, the manager of the Crystal Copper Company, that he wanted to lease a portion of the Goldsmith mine in the northwest of the claim, and so as soon as we heard that we decided together and we went and sent Frank Tamietti to see after we were all there in the house, we agreed to go up and see Mr. Alderson about the terms and conditions of this lease. So the condition and the terms of this lease, whatever it was we were doing on our part, was satisfactory; and the terms and condition was to pay so much for royalty, and after we paid the royalty divide from the net profit, divide fifty-fifty, and the condition was to sink fifteen feet more in the winze there, that it was down 35 feet already, and then we had the right to extract all the ores there was there on both sides, east and west, and if we were doing some improvement work from that deep up, north from that deep fifteen feet up to the level; if we were doing some extra work, you know, cross-cutting north and south and find some ore maybe, and have the right to take it all out, too.

MR. WAGNER: Just a minute. In order to save the record and expedite proceedings,

we move the answer be stricken and urge the same grounds urged in the objection to any future testimony the witness may give—we will ask to save the record that way, the same objections may apply, motions to strike and the same ruling.

THE COURT: It is so understood, the objection goes to all this testimony.

Q. When you referred to your partners, who did you refer to? When you spoke of your partners, what people did you speak of? (48)

A. Mr. Alderson and Mr. Lawrence Monzetti, and Mr. Frank Tamietti, and Mr. Pete Gaido, and myself, Batt Tamietti, and John Pagleero.

Q. Was Mr. Alderson one of your partners?

A. No, all the rest were my partners.

Q. What level in the mine was this winze you were going to work in?

A. The 500 foot level, the No. 1 Goldsmith shaft.

Q. How far was that from the shaft?

A. Northwesterly about a thousand feet.

THE WITNESS: The royalties, we were to pay were on ore of a value of twenty-five dollars a ton, $11.50; on ore of the value of from twenty-five to fifty dollars, we have to pay $23.00, and from fifty to a hundred dollars, we have to pay $34.00, and from $100.00 to $200.00 we have to pay $50.00, and from two hundred up, we have to pay 56% royalty. This royalty was to be paid to the Clark bank. We used to pay all the expenses of shipment and treatment before paying the royalty, and then we paid according to the value of the ore, so much per cent, and then divided fifty-fifty on the net, divided fifty-fifty with the Crystal Copper Company. I and my partners were to

have the other half. The ground or territory which we were to have, the lease, was to sink complete fifty feet in this winze, and then we would have the right to take all the ore there was east and west of that winze, and if we did some improvement work on the hanging and foot wall, would have the right to take it out too; have all the ore as far as it went. I spoke of fifty feet, and that was from the level, the 500 foot level. The winze was 35 feet deep before we started. The Crystal Copper (49) Company was to furnish the machinery, tools, supplies, powder, fuse caps, timber, and everything, and we have to do the work. The company was to hoist the ore and the waste, from the level, the 500 foot level, but we were to run it out to the shaft. When we started to work there there was about 10 or 12 feet of water in the winze, and we had water all the time we sank.

Q. And did you accept the terms of the lease?

MR. WAGNER: We object to that as being leading and suggestive and calling for the conclusion of the witness.

THE COURT: The objection is overruled.

MR. WAGNER: Exception.

A. Yes, sir, we accepted it in that way.

We started to work on the night of the 26th of June, at 10 o'clock, started sinking in the winze; started to rustle a pump and connect this pump and then started to work pumping the water, and after we had the water out we started to clean out lots of dirt that was around the winze in the bottom, and then of course started to blast, and timber and do anything we needed. It was only waste at that time. We sank down to the depth of about 45 feet before we had ore, and discovered ore about

that point, in the far corner of the east winze. We continued to sink until we had about fifty-one, fifty-one and a half or fifty-two feet and then the ore was going down and we had to sink more, and Mr. Alderson, he used to generaly come down every day in the mine, and we were working there together, the five, except when we used to hoist all ore and the waste; we had a little ore, to hoist on the level—we were not four there working; one hoisting the ore and the waste, and we asked permission of Mr. Alderson if we cannot sink more on this lead, and Mr. Alderson say "Sure," he said, "down in this winze," he (50) said, "until the ore is gone; the more you sink the more ore you are going to have up over your head; and you fellows going to make money and the company going to make money." So we keep on going and sinking until we were about 75 feet deep, and something come across from the west side, they call it a fault, and it cut all the ore out, so we agreed, our partners together, no more use to sink in here, there's no more ore and better notify Mr. Alderson that we intended to quit. All right. As soon as we went on top at noon-time we saw Mr. Alderson and notified him about it. Well, he would be down tomorrow, he said, and so all right. He come down the next day and he said, "All right, just sink in a sump enough to hold the water between one shift and another, and then," he say, "you can take out all the ore as quick as you can." So we start right away to sink a little bit of sump and then we went east and west extracting ore, the way the lead go, you see.

Four of us started to work in this winze on the night of the 26th, Mr. Lawrence Monzetti, Mr. Pete Gaido, and Mr. John Pagleero, but

our lease, when we went up to take this lease, was to be with five partners, but at that time Mr. Frank Tamietti was sick, but we were to take him in when he was able to work and accept him as a partner. He came to work there some time in July, the 15th or 20th, 1921, after we had struck the ore.

The terms of the extension were the same conditions as when we started to work there, exactly the same condition as to royalty and everything else, we were to follow the ore as far as it went (Tr. 54-58).

Peter Gaido's testimony concerning the alleged contract also went in over objection, and his version of the transaction, as contained in the record, is as follows:

"On the 500 foot level we know of a place that was to be leased, and Batt Taimetti and John Pagleero and Frank Tamietti and myself, we know the conditions and we would agree to go down and sink this winze on the 500 foot level, which was about one thousand feet northwest of the main shaft, and we were to sink that winze and go east and west as far as the ore would go. The agreement was to sink the winze to complete fifty feet. The royalties were to be so much per cent of the ore. The Crystal Copper Company was to furnish the tools and supplies, powder and timber and air, and to hoist (114) the ore and waste. We commenced working on that lease the 26th of June, 1921, and those going to work there were me and Mr. Frank Tamietti and Lawrence Monzetti. We went up and the first work we did was to establish the pump and to connect the pipe. The winze had 14 or 15 feet of water and we started to pump the water and when

we got that out there was a few carloads to pump out, and then we got timbers and fixed the winze and sank. Sank it 75 feet, complete with a sump. We put it about 50 feet down on the hanging wall lead, and we supposed it was good ore, and had Mr. Alderson, the general manager of the Crystal Copper Company, come down and look at it, and he said it was looking fine, and then our partners asked for permission to sink some more, and Mr. Alderson said, "Boys, sure, go ahead and sink the winze as far as the ore goes, and the more you sink the more we are going to have ore up above." We were to have extension of the lease on the same terms and conditions, and with the same royalties. The same way with the ore extending west and east and north and south. We followed the ore down the winze 70 feet, and it happened that a fault was coming in from the west end, and cut all the ore out in the bottom of the winze. As soon as we struck this fault we went in the office to Mr. Alderson, and told him we struck the fault, and he came down the next day and looked, and there was five partners at that time working, Batt Tamietti and Frank Tamietti, and Lawrence Monzetti and John Pagleero and myself, and he said it didn't pay to sink any more; Mr. Alderson say, "No, boys, you might as well not. We need some ore, go ahead and go east and west (115) and get all the ore you can as quick as you can" (Tr. 120-121).

Monzetti testified over objections concerning the terms of the lease as follows:

"The terms of the lease was to go down and sink the winze on the 500 foot level of the Goldsmith mine, northwest of the shaft about 1,000 feet.

The winze already extended down 35 feet south, and under the terms of the lease the work that was to be done was to go down 15 feet more. We found some ore after we got down about 48 feet. We were to have any ore we discovered in the distance between 35 and 50 feet. Under the lease we were to get all the ore we could find, as far up as the 500 foot level, and as far east as the ore would go within the mining claim, and as far west as the claim would go. The royalties we were to pay on twenty-five to thirty dollar rock was $11.30, and from thirty to fifty, $23.00 royalty, and from fifty to a hundred was $34.50, I think, and from one hundred to one hundred and fifty was $46.00, and from one hundred and fifty to two hundred was $56.00. The Crystal Copper Company was to furnish the equipment and the hoisting of rock and ore. We used to pump the water. The Crystal Copper Company furnished the pump. The (101) company furnished the air for the drills. The company furnished the pump, and we used to do the work. We started on that lease on the 26th day of June, 1921. The first day we went there we went down and put in the pump and connected the pipe on it, and pumped the water. The men who went down to work were myself and Mr. Pagleero and Pete Gaido. The first work we did was pumping the water. After we had the water pumped out we started to sink and clean up; started to pump because the water was standing there for quite a while and the ground was kind of loose and soft. We dug that winze as far as 75 feet. When we dug to the depth of 500 feet we were not supposed to go any further, and we notified Mr. Alderson to see if we couldn't sink any more, and he said to go ahead, and follow the

> ore, he said, as far as it goes, as far as went to, as far as the ore goes. We found ore above that, found the ore about 48 feet deep, that is from the top of the winze down 48 feet we found ore. Mr. Alderson said to extend the ore down as far as went on the ore. The ore went down as far as 75 feet. The conditions of the extension of the lease when we had the 500 foot down, as far as we could go, was the same as before, the same terms and conditions, that is, we were to have the ore from the depth where we reached up to the 500 foot level, up to the east end of the claim and to the west end of it, if it should go there. After we got to the depth of 75 feet we struck a fault; we then notified Mr. Alderson that it wouldn't pay to sink any more, and he said to sink a sump enough to hold the water before the two shifts; and then we started drifting on the ore" (Tr. 107-108).

The foregoing constitutes the evidence in the record concerning the alleged contract.

It is apparent that all of the alleged partners did not voluntarily join as plaintiffs to the action. Batt Tamietti himself testified:

> "There were five of us in this partnership, Mr. Pete Gaido, Frank Tamietti, Lawrence Monzetti, John Pagleero, and myself. Frank Tamietti is here in court at present, as is also Pete Gaido. Frank Tamietti is my brother. My brother, Frank Tamietti, did not join me in this suit as plaintiff" (Tr. 98).

Frank Tamietti, one of the parties, testified concerning his connection with the case, as follows:

"My name is Frank Tamietti; I reside in Walkerville, Montana, and am a brother of Batt Tamietti, one of the plaintiffs. I am named as one of the plaintiffs in this action but have got nothing to do with the case. I was working in partnership with Batt Tamietti, Lawrence Monzetti, Pete Gaido and John Pagleero on the 15th of January, 1922, but not the 16th" (Tr. 156).

John Pagleero, also one of the parties, testified:

"After the arrangement between myself, Frank Tamietti, Bat Tamietti, Pete Gaido and Lawrence Monzetti was terminated on the 16th of January, 1922, I received a settlement in full for my stock and my money from the Crystal Copper Company. I have no interest in this case now" (Tr. 175).

Monzetti testified:

"On the 16th of January, Mr. Alderson told me that the lease was cancelled. I had moneys coming at that time as a result of ores I had shipped to the smelter, and received the moneys that was due me for ores I had shipped. At the time the lease was cancelled and right afterwards, I was paid for everything I had taken out and shipped, for everything I had mined and shipped" (Tr. 114).

That he received from the defendant a check dated March 4, 1922, in the sum of one hundred ($100.00) dollars (defendant's exhibit J, Tr. 31), and on the same day a check for one hundred ($100.00) dollars in settlement of his stock deal

with the defendant (defendant's exhibit K, Tr. 131), and on the same day a check in the sum of eleven and 43/100 ($11.43) dollars for services rendered to March 4th, 1922 (exhibit L, Tr. 132); another check in the sum of eighty and 85/100 ($80.85) dollars for services rendered to January 31, 1922 (defendant's exhibit M, Tr. 132), on the same day he signed defendant's exhibit N, as follows:

"DEFENDANT'S EXHIBIT "N."

Butte, Montana, March 4th, 1922.

Received of the Crystal Copper Company, a corporation, of Butte, Montana, the sum of eleven and 43/100 dollars, being my proportionate share in all ores shipped in the name of the Crystal Copper Company, a corporation, by me, as a co-partner with others with whom I was interested in a certain lease.

This payment is acknowledged by me as full and complete settlement and satisfaction of any and all claim or claims that I may have against the said Crystal Copper Company, and as full and complete satisfaction of any and all demands that I may have against the Crystal Copper Company, the corporation aforesaid.

LAWRENCE MOZETTI.

Witness:

MATT W. ALDERSON."

(Tr. 133.)

These exhibits all went in over objection of his counsel, the witness claiming that at the time he received these checks and signed the release that he had been working in a mine and was just com-

ing off shift, and had been working in a gassy place and was sick at the time with gas, but nevertheless he cashed the checks and kept the money (Tr. 176-180, inc).

Prior to his decease and at a former trial of this action, Matt W. Alderson, defendant's agent, testified that there was due, owing and unpaid to Batt Tamietti the sum of eleven and 43/100 ($11.43) dollars, and eleven and 42/100 ($11.42) dollars to Pete Gaido (Tr. 139); Batt Tamietti testified that this amount due him had been tendered him, and that he knew that his other partners, Frank Tamietti, John Pagleero and Lawrence Monzetti, took their shares, his testimony in this regard being:

> "I worked there from the 26th of June, went to work, I and my partners, on the 26th of June, 1921, on night shift, and worked up until the evening of January 16, 1922, a period of seven months and sixteen days. In that time we took out ten carloads of ore, nine carloads containing fifty tons and one about 45 tons. For the ore that I took out in those shipments I did not receive my full portion of the net profits, all but about eleven dollars and forty-three cents, and those two hundred shares. I refused to take $11.28 that Mr. Alderson tendered, because he wanted to make me sign a paper that I didn't have to sign, and I refused to take the money. I know that my other co-partners, Frank Tamietti, John Pagleero and Lawrence Monzetti took their share. They also took their share of the stock" (Tr. 99).
>
> "This $11.28 that Mr. Walker spoke about

> was handed to me by Mr. Alderson, and he offered to give it to me with a piece of paper that he wanted me to sign, and said, 'Before I give you this check I want you to sign this.' I said that I couldn't read it. He said, 'You can read it, and after you read it I want you to sign this.' I said, 'I won't sign this, I got this in the hands of my attorney, and I have to see if it is all right.'" (Tr. 100.)

The amounts due Gaido and Batt Tamietti, as above indicated, amounting to twenty-two and 85/100 ($22.85) dollars, with accrued interest, were deposited in court for the use and benefit of said parties (Tr. 145-146).

The foregoing embraces all of the testimony in the record pertinent to the issues involved touching the alleged contract, and the dealings of the parties inter sese.

Upon the question of damages for loss alleged to have been sustained by reason of the breach of the alleged contract, based upon prospective profits, opinion testimony was introduced. The witness Batt Tamietti gave his opinion that there was something like about one thousand tons of ore left in the ground which they were deprived of mining (Tr. 98). The witness Pennington qualified as a surveyor and civil engineer. He prepared a plat of the ground in controversy, from data furnished him, but never saw the ground, and his testimony was purely speculative, and not from actual observance of the mine itself (Tr. 102-103). He

gave it as his opinion that there were about twelve hundred seventy-five tons of ore remaining to be mined (Tr. 105). Richards testified concerning conditions as he believed them to be, he having at one time worked in the mine (Tr. 117-118). Gaido also gave testimony concerning the territory in dispute (Tr. 119, et seq.). However, this testimony was all eliminated from consideration, for the reason that Frank Tamietti, one of the plaintiffs testified:

> "After January 16th, 1922, when Lawrence Monzetti, Pete Gaido and Batt Tamietti were stopped working there I and John Pagleero continued in the same ground, and took out all the ore that was left in that ground where we had a lease, three cars; there were three cars in that territory.
>
> You can tell by the date of the smelter returns which of these three cars was the shipment of ore we took out on this particular ground. We never did take out any ore of any value on the east side of the fault, and the highest value we took out was on the old stope or what you call the old lease. On that ground my brother, Lawrence Monzetti, Pete Gaido, John Pagleero and I had prior to the 16th day of January, 1922, all the ground that we had under that contract or lease or agreement, whatever it was, there was only three cars left. John Pagleero and I, after January 16th, 1922, did development work or prospective work along the foot wall in the particular ground that Batt Tamietti, my brother, John Pagleero, Pete Gaido, Lawrence Monzetti and I had prior to the 16th of January, 1922; we prospected the foot wall in that particular ground. On

the first forty-five feet from the winze Mr. Alderson came down and said for us boys to start and open up the foot wall ore (168) that it was showing up on the level, for which we sunk our winze, and they were with us until the 15th or 16th, I don't know what you call it, the last day in January; and we went and tapped the lead and when we tapped the lead we found a little streak there that we did sample, and what we took out I know we didn't take out more than about a mine car, and after that they got through it, and, of course, after a while I will tell you why. They got through after and we keep going to work, and we want to go and raise. We went a little east, not very much from these raise or cross-cut or what you call it, about a set, and we went up a hole there but didn't have any value. Well, Mr. Alderson comes down and he says, 'I am not satisfied with all of this,' he says, 'we got to make it sure,' he says, 'if we will leave any more ore on the foot wall.' He says, 'You boys,' he says, 'you got to start another cross-cut a little over east and develop this place and find out if there is any more ore left here.' We decided to come over to the end of our drift where the fault cut off the both lead, and we went in a few feet, but they were not with us any more, and we drive this cross-cut in about forty feet; the lead was running more close over to the hanging wall lead, we didn't have to go so far, and after that we drive from east, we drive, drift to west, and meet the other cross-cut where we tapped a lead of ore; the ore no good; didn't sample more than three or four ounces or six the most; we raised until we went to the level and the ore was no good there; didn't have no value in it, that is what I mean.

We did not ship any ore from the footwall; never shipped a car except what I told you in the cross-cut where we took out about a mine car, and that is all that was there. All the ore that was left in the ground that plaintiffs have been talking (169) about in the hanging wall, we only shipped three cars. All the ore that was left in that ground that I and John Pagleero and Batt Tamietti and Lawrence Monzetti and Pete Gaido had this working agreement on which was terminated on the 16th of January, was three cars, in that block of ground. After we took the three carloads out there wasn't a pound of ore left there.

I did not consult with Mr. Tyvand or McCracken about being a party to this suit. I did not confer or consult with Messrs. Tyvand and McCracken or with the plaintiffs Lawrence Monzetti, Pete Gaido or Batt Tamietti, about this case. They came to me and wanted me to sign and go with them, and fight the case, but I said I would have nothing to do with it. I said the Crystal Copper Company, the manager, treated me good, and I have got nothing to say against it. I said, 'If you want to fight it go ahead and do it yourself.' We got fifty feet more ground than we asked for. I received all the stock and settled for all the stock I agreed to take" (Tr. 169-172).

Pagleero also testified:

"I was originally from the 26th day of June, 1921, up until the 16th day of January, 1922, engaged in working in the Goldsmith mine with Lawrence Monzetti, Pete Gaido, Batt Tamietti and Frank Tamietti, and am familiar with the ground in which we were operating; know the winze, the stopes and everything.

After the lease, or agreement or contract, whatever it was, was terminated on the 16th of January, 1922, I and Frank Tamietti continued working there in the same ground. After they got through, I think it was three cars of ore that we took out on this side of the fault and four on the other; but am not sure, didn't keep track of that. I think it was three railroad cars that we took out of the particular ground they were working in. We took all the ore we could find that was left there after they had all gone—that we could find in the hanging wall. There was some low grade, but nothing of value. We did some development work on the foot wall in that ground. We drove a cross-cut on the footwall and then we drove a little drift in the foot wall and drove up a couple of raises and couldn't find anything; there was lots of low grade but no value from the assay. We made no shipment from the foot wall of any ores. I think we had about seven or eight hundred pounds. In the first cross-cut we found a little pocket, not quite a mining car, a few powder boxes full" (Tr. 174-175).

The same witness again postively testified that there were only three cars of ore left in the ground, and these were shipped and the returns thereof are found in plaintiff's exhibit Q (Tr. 157-163). So much of these returns as we deem pertinent to this statement follows:

"Net from smelter	$1975.91	
Leasers—one-half	$ 988.00	
Hospital dues, 6 persons, Feb.		$ 6.00
Industrial Accident, Jan. 16 to Feb. 28, 6 persons		23.00

Check 7694—Harry Daniels..... 75.50
Check 7755—Anton Carlevato—30 days —$1.00 ..... 141.50
Check 7756—Sanz—23 days—$1.00..... 108.25

$354.65

Chack 7757—E. H. Walker, Secy.....$ 50.00
Check 7758—Pete Vidack..... 16.65
Check 7759—Ralph Paasch 16.65
Check 7760—John Veal..... 16.70
31½ ds. Check 7761—John Pagleero $166.95—$25 stock sb..... 141.95
32 ds. Check 7762—Frank Tamietti, —$25 stock sub..... 144.60
29 ds. Check 7763—Coston Ponsetti, $153.70—$25 Vidack contract..... 128.70
27 ds. Check 7764—Wm. Bullock, $143.10 —$25 Vidack contract..... 118.10

$988.00

"Net returns from smelter.....$3972.10
Leasers—one-half 1986.05

Check 7845—John Waldie, loading car 2845, Feb. 15.....$ 6.50
Check 7846 Matt Sutter, loading car 2845, Feb. 15..... 6.50
Check 7896—Barry Murphy, loading car 1677 ..... 15.50
Check 7894—Antonio Carlevato, 24 d. @ 4.75..... 114.00
Check 7895—Joe Sanz, 17 d. @ 4.75..... 80.75
Check 7897—E. H. Walker, Secy. stock.. 50.00
Check 7898—Pete Vidack..... 16.70
Check 7899—Ralph Paasch..... 16.65
Check 7900—John Veal..... 16.65
Check 7901—John Pagleero..... 424.45
Check 7902—Wm. Bullock..... 414.45

Check 7903—Caston Ponsetti		404.45	
Check 7904—Frank Tamietti		419.45	
		$1986.05"	
"Net return		$2,013.47	
Leasers' one-half		1,006.74	
Mar. 31. Hospital dues, 6 persons—	$21.60		
" " Industrial Accident 6 persons—$15.60	$ 21.60		
Apr. 12. Barry Murphy, loading car		5.83	7982
W. R. Richards, loading car		5.83	7983
Antonio Carlevato, 21 days, less $1.00		98.75	7984
Joe Sanz, 19 days—$1.00		89.25	7985
Wm. Bullock, 18 shifts, 196.37, plus 3.75		200.12	7986
Costan Ponsetti, 17 shifts, equals $196.37, less $5, plus $3.75		195.12	7987
John Pagleero—16 shifts equals $196.37, less $25, $3.75		165.12	7988
Frank Tamietti, 18 shifts, equals 196.37, less $25, plus 3.75		175.12	1989
E. H. Walker, Secy., Sub.		50.00	7990
		$1,006.74"	

(Tr. 159-163.)

The share received by the miners on these three cars shipped after the contract was terminated on January 16, 1922, amounts to two thousand

nine hundred eighty and 74/100 ($2,980.74) dollars, but it is obvious that all of this did not go to the miners, some deductions being made for loading cars, industrial accident insurance and other work, the figures of which amount to two hundred forty-one and 16/100 ($241.16) dollars, or net to the miners of twenty-seven hundred thirty-nine and 58/100 ($2739.59) dollars.

The record is silent as to the length of time required to mine these three cars; however, it does disclose that the first car was shipped February 25, 1922 (Tr. 158), and that seven miners participated in the distribution of the proceeds of that car; the second car was shipped on March 21, 1922 (Tr. 160), and nine miners participated in the distribution of the proceeds of that car; the third car was shipped on April 11, 1922, and six miners participated in the distribution of the proceeds of that car (Tr. 162).

The plaintiffs Frank Tamietti and John Pagleero helped to mine the ore shipped in these three cars and both participated in the proceeds, as appears on the face of the exhibits.

For the avowed purpose of showing the value of the ore to make an estimate of that remaining in place and to show ratification of the contract upon the part of the company, the plaintiffs were permitted to introduce the smelter returns on all of the ores that had been shipped (Tr. 61-87-148-153).

These statements disclose that Batt Tamietti had received approximately fourteen hundred seventy-two ($1472.00) dollars as his share of the profits on the ten (10) cars, and Gaido fifteen hundred thirty-one ($1531.00) dollars as his share; both parties having worked from the 26th day of June, 1921, until the 16th day of January, 1922.

At the close of the testimony and when both parties had rested, the defendant moved the court for a directed verdict (Tr. 181), and this was granted as to the second count in plaintiff's complaint, and denied as to the first, and the denial of this motion presents one of defendant's specifications of error, and will be found there, as will also instructions refused and other errors relied upon.

Upon the question of damages, the law of the case as contained in the instructions of the court is as follows:

> "If you find from the evidence that the plaintiffs were able, willing and ready to mine certain ores that the defendant is alleged to have leased to plaintiffs, and that the defendant has prevented plaintiffs from mining said ores, the measure of damages to plaintiffs is the value of the ores that the plaintiffs have been prevented from mining, less the cost of mining, shipping and smelting the same, less the royalties from the net smelter returns (189) less the defendant's one-half of the net balance (Tr. 194).
>
> "In this case you are instructed that the plaintiffs seek recovery upon the proposition that they are a mining co-partnership, and in

this connection you are instructed that the plaintiffs Frank Tamietti and John Pagleero have admitted that full settlement has been made to them, and that they have no claim in this litigation against the defendant; and you are further instructed that it is disclosed by the evidence in this case that the plaintiff Lawrence Monzetti was paid in full for all services performed by him under the contract sued upon, and that he signed a release which is in evidence in this case, whereby he admitted full settlement had been received by him for and on account of any interest he may have had in the contract sued upon; hence, the three plaintiffs named are not entitled to recover anything against the defendant, and the sole remaining question for your consideration is whether, under the facts and the law as given to you by the court, the remaining plaintiffs, Pete Gaido and Batt Tamietti, are entitled to recover anything at all against the defendant, as co-partners, each entitled to a one-fifth interest in the profits of the co-partnership, unless in the case of the partner Lawrence Monzetti you believe he was unconscious at the time of signing the release and incapable of realizing the nature and consequence to himself of his act. The evidence in this case submitted by the plaintiffs disclose that three cars and no more of commercial ore was mined and shipped from the hanging wall from the territory claimed by the plaintiffs under their alleged contract, and in this connection the court instructs you that the plaintiffs would be entitled to recover damages, if at all, on the three cars of commercial ore so mined and shipped, only upon the net profits that would accrue to them (191) after deducting all expenses incident to mining the same, and the

burden of proof rests upon the plaintiffs to prove by a preponderance of the evidence that the said ore could and would have been mined by them not at a loss, but at a profit to themselves, and if it could and would have been mined at a profit, then the plaintiffs would be entitled to recover only two-fifths of such profits after deducting the cost of mining as indicated, unless you should find in the instance of Lawrence Monzetti, the condition mentioned at the conclusion of the last instruction as to whether he was conscious or unconscious at the time of signing the release in full.

The court instructs you that in ascertaining whether or not the plaintiffs or any of them were damaged by breach of contract alleged, that no damages may be awarded which are not clearly ascertainable in both their nature and origin, that nothing may be left to speculation and conjecture, and the burden of proof in this case rests upon the plaintiffs to prove by a preponderance of all of the evidence that any ores which they were deprived of mining and would have mined had the contract not been rescinded could and would have been mined at a profit to them, and it is only for such profit that plaintiffs may recover; therefore, if you believe from the evidence that the plaintiffs have failed to establish whether any ores they may have been entitled to mine could have been mined at a profit to themselves or a substantial amount of such profit, then your verdict must be for the defendant.

If you find from a preponderance of the evidence that the agreement or lease was made as alleged, and that th defendant ousted plaintiffs from possession, as alleged, and that plaintiffs (192) had they continued under their

lease, being willing and able so to continue, would have mined the ground at a profit, you are instructed to find for plaintiffs in some amount; in other words, if you so find, plaintiffs would be entitled to at least nominal damages.

As provided by section 8667 of the Montana Codes, for the breach of an obligation arising from contract the measure of damages except as otherwise expressly provided for in this code is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom. And again, in section 8668 of the same codes, damages must be certain. No damages can be recovered for breach of contract which are not clearly ascertainable in both their nature and their origin. The Supreme Court of this state holds it is elementary that competent evidence must be produced of all facts necessary to a recovery upon which the jury can base a reasonably reliable conclusion; nothing can be left to their conjecture; actual damages only may accrue. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. Actual damages which will sustain a judgment must be established not by conjectures or unwarranted estimates of witnesses, but by facts upon which their existence is logically or likely inferred. Speculations, if any, because of estimates of witnesses are not a proper basis of recovery (Tr. 195-198).

ASSIGNMENT OF ERRORS.

I.

The court erred in denying plaintiff in error's motion for a directed verdict at the close of all of the evidence for a directed verdict at the close of all of the evidence in the case, which said motion is in words and figures as follows:

The defendant now moves the court to direct a verdict in favor of the defendant and against all of the plaintiffs on the grounds and reasons following:

First: There is a fatal variance between the allegations and the proof in this, that plaintiffs rely for a recovery upon the proposition as alleged in their complaint that the plaintiffs were and are a mining co-partnership, engaged in mine sub-leasing (202) and sub-letting from the defendant Crystal Copper Company, whereas the proof affirmatively shows and discloses that the relationship of mining partners does not and never did exist between these parties in so far as their negotiations and work for the defendant was concerned, but that the proof affirmatively discloses that they were operating and working under a license and not a lease, and that their relationship was nothing more than that of a working agreement for a share of the profits.

There is a fatal variance because the parties, Lawrence Monzetti and the plaintiffs Pete Gaido and Batt Tamietti, if they have any cause of action at all against the defendant, it would be as individuals for work, labor and services performed.

Next: That the evidence is insufficient in law to prove a mining co-partnership between the plaintiffs in their relations with the de-

fendant in this case. The evidence is insufficient to prove a lease between the plaintiffs and the defendants, and the evidence establishes, if its establishes any contractual relationship at all, a contract embodying a license. The evidence is insufficient to establish a lease for the reason that a lease of the real property of a mining corporation may only be secured by compliance with the provisions of section 6004 of the Revised Codes of Montana, 1921, which requires affirmative approval of the stockholders and the board of directors.

Next: The evidence is insufficient to warrant a recovery by the plaintiffs or any of them, upon the theory that they are a mining co-partnership because under the express provisions of section 8059 of the Revised Codes of Montana of 1921, the acts and deeds and things of a majority of the members of such partnership controls all acts of the partnership, and it affirmatively (203) appears in this case that a majority of the members of the so-called partnership have no interest in this litigation, and the same may not be maintained by a minority of the members.

Next: The evidence is wholly insufficient to prove any damages sustained by the plaintiffs or any of them in the event the court should hold that they were operating under a lease and not a license for the reason that the evidence pertaining to proof of prospective profits or damages by reason of the cancellation of the lease falls short of giving to the jury any tangible basis upon which to base any rational judgment as to damages, but that it would require speculation and conjecture to reach any verdict, and the same would be the result of mere guesswork having no foundation in the evidence in this case, particularly

for the reason that there is no evidence showing or tending to show how long it would have required the plaintiffs to mine the ore in place which they contend they were deprived of mining, nor the cost of mining such ore nor the incidental expenses or work or labor necessary to prepare the ore for shipment, nor is there any evidence in this case showing what the ore if mined could have been smelted for, nor what proportion of the net profits of such ore proportionate of the net profits in dollars woudd accrue to the plaintiffs. There is no evidence before the court showing what the market price of the metals contained in the ore and from which the plaintiffs would derive net proceeds was or would be.

Further, the contract contended for by the plaintiffs as alleged in their complaint is one void under the statute of frauds of the state of Montana, and the proof in this case discloses that the contract contended for in the complaint is not a lease but a working contract or license.

These matters being directed to the first count.

As directed to all of the evidence and to both counts of the complaint, the evidence wholly fails to show any measure of damage in that it fails to disclose the cost of removing the ore the plaintiffs claim they were deprived of mining or the number of men it would have been necessary to employ to remove it or how many of the partners or alleged partners, or the labor of how many of the partners or alleged partners would be required to remove it or the cost of the mining, would have been.

And for the further reason that the evidence wholly fails to disclose that the partnership as a mining partnership or otherwise,

collectively or individually was ready, willing and able to perform its part of the contract alleged or would have performed it as a mining partnership or as individuals had they not been interrupted by the acts of the agent of the company (Tr. 206).

II.

The court erred in refusing to instruct the jury upon matters of law as requested by the plaintiff in error, as follows:

Gentlemen of the Jury:

In this case the plaintiffs claim that they entered into a contract or lease with the defendant corporation, Crystal Copper Company, whereby they were granted the exclusive right to mine certain territory embraced within the Goldsmith mine located in Silver Bow county, Montana. In this connection you are instructed that the contract sued upon is in all essential features a contract for labor to be performed and to be paid for by a share of the profits realized from such labor, and in this case it appears that the plaintiffs have been paid for all of the labor performed by them under said (205) contract from the profits realized from the ores mined by them ,save and except the sum of $11.43, due, owing and unpaid to the plaintiff Pete Gaido and a like sum to the plaintiff Batt Tamietti, but these sums with accrued interest have been paid to the clerk of the court for the use of the said plaintiffs prior to the beginning of this trial; therefore, your verdict will be against the plaintiffs and in favor of the defendants.

NOT GIVEN.

(Signed) C. N. PRAY,
Judge.

(Tr. 209.)

III.

The court erred in refusing to instruct the jury upon matters of law as requested by the plaintiff in error, as follows:

Gentlemen of the Jury:

In this case if you find for the plaintiff the court instructs you that you may find for them no more than nominal damages which would include the $28.00 deposited with the clerk of the court in this case for the use and benefit of the plaintiffs Batt Tamietti and Pete Gaido, together with such additional nominal sum as to you may seem just and meet in the premises.

Nominal damages are distinguished from actual, substantial or compensatory damages and are given not as an equivalent for any wrong but in recognition of technical injury, and by way of declaring a right, and the amount of such damages must not exceed a trivial sum.

NOT GIVEN.

(Signed) C. N. PRAY,
Judge.

(Tr. 210.) (206)

IV.

The court erred in refusing to instruct the jury upon matters of law as requested by the plaintiff in error, as follows:

Gentlemen of the Jury:

In this case the court instructs you as a matter of law that it does not appear from the evidence received in this case whether the plaintiffs could or would have prosecuted their alleged contract to completion at a profit to themselves, therefore your verdict will be for the defendant.

NOT GIVEN.

(Signed) C. N. PRAY,
Judge.

(Tr. 211.)

V.

The court erred in refusing to instruct the jury upon matters of law requested by the plaintiff in error, as follows:

Gentlemen of the Jury:

In this case you will return a verdict against the plaintiffs and in favor of the defendant.

NOT GIVEN.

(Signed) C. N. PRAY,
Judge.

(Tr. 211.)

VI.

The court erred in failing to instruct the jury upon matters of law as contained in the exceptions of the plaintiff in error to the charge of the court, as follows:

"MR. WALKER: If the court please, to the charge to the jury of the court, counsel for the defense on behalf of the defense, asks for a general exception and asks for a general and special exception for the failure of the court to charge that the contract sued upon was a working agreement to be paid for by a share of the profits of the venture for which plaintiffs have already been paid. Second, that the court erred in (207) failure to charge that under the evidence plaintiffs are limited to recover, if at all, only nominal damages. Third, for the failure of the court to instruct the jury to return a verdict in favor of the defendant and against the plaintiffs. For further reason the court erred in failure to instruct the jury that the contract between the parties, plaintiffs and defendant, was a license revocable at will, instead of a lease of ground for royalty (Tr. 211).

VII.

The verdict and judgment are contrary to law (Tr. 212).

ARGUMENT

ASSIGNMENT OF ERRORS 1, 5, 6 and 7

THE STATUS OF THE PARTIES INTER SESE:

The first and seventh specifications are comprehensive and embrace nearly all of the points we will urge in this argument; so much thereof as relates to the status of the parties inter sese will be first argued.

As pointed out in the statement, the five parties whose names appear as plaintiffs to the amended complaint, from the beginnig insisted that they were and are a mining co-partnership (Tr. 5, Par. 5) which contention was specifically denied by the company in its answer (Tr. 28 Par. 5). So insistent were Pete Gaido and Batt Tamietti in their notions about the partnership that they joined Frank Tamietti against his protest, as one of the parties, and joined John Pagleero when he had no interest in the case. These parties were joined manifestly for the reason that the parties took the postion that being a mining co-partnership all of the members of the partnership were necessray parties to successfully prosecute their action against the Company. It is therefore as mining co-partners that they must recover, if at all; their sole contention being predicated upon the proposition that the alleged breach of contract was the so called partnership, and not with any of the parties as indviduals.

Mining co-partnerships have been recognized since

the beginning of the mining industry in this western country. They exist by operation of law without any express agreement.

Since the enactment of our Codes, in 1895 express statutory authority is conferred for the formation of mining co-partnerships by porole (Sec. 8051 Revised Codes of Montana 1921) but it is essential to the existence of mining co-partnership that certain elements be made to appear affirmatively, the statutory declaration being:

> "A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom, actually engage in working the same."
> Sec. 8050 Revised Codes of Montana, 1921.

This Section and the one adverted to formerly appeared as Sections 3350 and 3351 of the Civil Code of 1895 and our Supreme Court in the case of A. C. M. Co., vs. B. B. M. Co., 17 Montana, 519 held that the requirments of the statute were necessary to the existance of such partnership.

In distinguishing between general and mining partnerships, the court said:

> "A mining partnership, under the statute, is very different from an ordinary partnership. There is usually, practically, in a statutory mining partnership, no delectus personarum (Doughtery v. Creary, 30 Cal. 300), as there is in ordinary partnerships. An ordinary partnership is formed by contract between the

partners. A mining partnership is formed by reason of the existence of certain facts described in the statute. Those facts are:

(1) That two or more persons shall own or acquire a mining claim for the purpose of working it, and extracting the minerals therefrom (section 3350, Civil Code); that is to say, the relation arises from the ownership of the shares or interests in the mine. This is the first fact as a foundation for a mining partnership.

(2) The second fact required to exist is that such owners actually engage in working the mine (A. C. M. Co. v. B. & B. M. Co., 17 Mont. pp. 519-528).

Our statutory provisions relating to mining partnerships were borrowed from California and were enacted in that state in 1872 and are found in the California Civil Code as sections 2511, et seq.

The District Court of Appeals for the First District of California had occasion to construe these sections under facts essentially similar to those of the case at bar, and in the decision adverted to the matter was brought to the attention of the Supreme Court of the state for rehearing, and the petition denied.

The case adverted to is Michalek v. New Almaden Co., 184 Pac., p. 56.

In that case the plaintiff sued as the agent of five individuals who were alleged to have been the members of a mining co-partnership, for the recovery of the reasonable value of work and labor per-

formed by the co-partnership. It appears from the statement of facts that the defendant was the owner of a quicksilver mining property in Santa Clara county, and that the persons composing the alleged co-partnership had been working as miners upon the property, and while so working they discovered some quicksilver metal. An interview was thereupon arranged with the general manager and foreman of the defendant and th spokesman for the alleged partners with the result that an oral agreement was entered into between the manager and miners whereby they agreed that the miners could have the privilege of opening up a tunnel and to take out ore and deliver it to the company for one and one-half years after the completion of the tunnel, for which the company was to pay them at the rate of six dollars per ton for each one per cent of quicksilver in the ore delivered by the co-partnership to the defendant at the mouth of the tunnel. In that case, as in this, the defendant agreed to furnish the miners with all necessary mining tools and supplies for the purpose of opening the tunnel. The miners were to receive nothing in the way of wages but were to do the work upon their own account. Their sole compensation being as indicated. In that case, as in this they were not bound to work any specified length of time; there was no writing evidencing the contract; the evidence disclosed that they were re-

ferred to, among themselves and by other employees of the defendant, as partners, and were generally recognized as such. But the court held that such proof was insufficient to establish the peculiar character of the partnership necessary for the successful maintenance of the plaintiff's cause of action. Among other things, the court said:

> "The facts above recited do not prove the existence of a mining partnership. Under the sections of the Civil Code above referred to and to the authorities in which the nature of such a partnership has been considered, the ownership of an interest in a mine or the right to the possession thereof, or an option to purchase the same, is a prerequisite for the existence of such a partnership. Under section 2511 of the Civil Code:
>
> 'A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom actually engage in working the same.'
>
> Under this definition the ownership or acquirement of a mining claim, or of at least an interest therein, and the actual engagement in working such a claim, are both essential before a mining partnership exists by reason of the joint interest of the partners in a mining claim. In the case at bar the alleged partners had no such interest when the alleged partnership was formed, nor did they subsequently acquire any. Their contract amounted to nothing more than the privilege of working upon a mine in which they neither had nor were to acquire any interest. It was a contract of employment."

The opinion in the case above further points out that certain authorities were relied upon holding that the fee of a mining claim was not necessary for the existing of a mining partnership, but in disposing of such contention the court said:

> "An examination of the cases cited by the text-writers discloses that the mining partnerships there involved were decreed by reason of the existence in the partners of some interest in the property, or of a right of possession in their own right, as distinguished from that of the owner. The recent case of Harper v. Sloan, 177 Cal. 174, 169 Pac. 1043, 181 Pac. 775, is cited by respondent, and is an example of similar cases. In that case the plaintiff acquired under his contract the privilege of purchasing the property, and conveyed to his associates a portion of the right. Such a contract vests in the holder thereof an equitable or contingent interest in the property itself. In Crowley v. Genesee Mining Co., 55 Cal. 273, the court construed a contract by which the plaintiff was employed to work in a mine belonging to defendant for the purpose of taking out what is known as 'tribute rock,' and delivering it at the defendant's quartz mine, to be crushed at its mill free of costs or expense to the plaintiff, and as compensation for his services one-half of the gross proceeds of each crushing was to be paid to the plaintiff. That contract was held to be a 'contract of employment under section 1965, Civil Code.' In Hudepohl v. Liberty Hill Consolidated Mining & Water Co., 80 Cal. 553, 558, 22 Pac. 339, 340, a written contract was executed by the superintendent of a mining company to plaintiff and an associate 'the right and privilege to work

> and mine' certain mining property; that the company was to make improvements necessary for commencing and carrying on the work; and that the other parties were to work and mine the ground and receive one-half of all the gross products as compensation. In construing that contract the court said:
>
> 'Such a contract does not create the relation of landlord and tenant, but fixes a rule of compensation for services rendered. It is, in all its essential features, a contract for labor to be performed, and to be paid by a share of the profits realized from such labor.' "
>
> Michalek v. New Almaden Co., 42 Cal. App. 736, 184 Pac. p. 56 (Cal.).

In the above case plaintiff had judgment in the trial court and it was reversed upon the ground that the verdict was not supported by the evidence in that no mining co-partnership was proved.

This decision is supported by the text-writers. In 17 California Jurisprudence, under the title "Mines and Minerals," the following propositions of law relating to mining co-partnerships are laid down:

> 106. Definitions and Distinctions.—A mining partnership is a qualified partnership relation which exists when two or more persons who own or acquire a mining claim for the purpose of working it or extracting the mineral therefrom actually engage in working such claim. Parties owning a claim as tenants in common are to be considered as partners in the working of it. The actual working of a mine by the owners for their mutual benefit is essential to the existence of the partner-

ship relation, but it is not essential that each partner shall actually perform physical work, since one who supplies money which is to be used in working a claim is as much engaged in such work as one who devotes his own labor to the enterprise, nor is it necessary that the property be owned in fee by the partners, if they have an interest therin, or a right to possession of the property or to acquire its ownership. Mining partnerships are to be distinguished not only from ordinary partnerships, which may be created by contract even if the business of the partnership relates solely to mines, but also from the relations which exist under a contract between a mine owner and another for working the mine on shares, or for a given price for ore mined and delivered, or for wages and an interest in the mine if it is found to be a paying mine, as well as a grant of an undivided interest in mining ground which conveys only a right to take mineral therefrom, or a contract to buy an interest in a mine.

107. Formation.

'An express agreement to become partners or to share the profits and losses of mining is not necessary to the formation or existence of a mining partnership. The relation arises from the ownership of shares or interests in the mine and working the same for the purpose of extracting the minerals therefrom.'

While no actual or express agreement is necessary, mining partnership may be formed pursuant to a contract between the parties, and recognized and established usage on the part of a firm should be taken as part of the contract of partnership. Thus an agreement between a mining claimant and another, that the latter will explore and develop the mine

> in consideration of tools and provisions and a share in the mine if it proves valuable, followed by a joint working of the mine and sharing of the profits, constitutes a mining partnership. Likewise, a mining partnership is formed where one who is in possession of a claim, under an option contract, transfers to another a share of his interest in consideration of a sum to be used by him in developing it, and continues in possession and the actual work of the mine. But a mining partnership is not formed by an agreement to operate a mine upon the happening of some contingent future event, or by an agreement which does not contemplate a joint working of the mine by the parties.
>
> (17 Cal. Jurisprudence, par. 106-107.)

An examination of the cases cited in support of the text, supra, will disclose that the doctrine announced in the Michalek case, supra, has had ample previous recognition by the courts of that state.

As already pointed out, the state of California enacted its statutory provisions relating to mining co-partnerships in 1872, the identical provisions whereof are incorporated in the Montana Codes, and it is a well recognized principle of statutory construction that we took these statutory provisions with the construction given them by the California courts.

We respectively take the position that there was a fatal variance between the allegations and the

proof in that the plaintiffs failed to prove themselves a mining co-partnership and, under the authorities above, and those cited, infra, under the assignment; Lease or License: Statute of Frauds, a judgment running to some of them as individuals, is fatal.

THE DECISION OF A MAJORITY OF MINING CO-PARTNERS GOVERNS:

It would seem that the foregoing discussion should put and end to this controversy; however, if this court should be constrained to hold that the parties named contracted with the company as a mining co-partnership, and not otherwise, then we call the court's attention to the provisions of section 8059 of the Revised Codes of Montana, of 1921. It reads:

> "8059. Owners of majority of shares govern. The decision of the members owning a majority of the shares or interests in a mining partnership binds it in the conduct of its business."

The statement of the case discloses that Frank Tamietti and John Pagleero claimed no interest in this controversy, nor did they claim that there was due or owing to them anything whatsoever which had not been fully paid at the time of the termination of the contract, and their compensation consisted only of payment for moneys earned as royalties on ores already mined. They conceded the

right of the company to bring the contract to an end.

Lawrence Monzetti likewise acknowledge payment in full, and discharged the company from any further liability, but, he, of course, attempted to repudiate his agreement at the trial; however, a majority of the parties have no interest in this litigation, and it would seem that under the provisions of the statute, supra, the decision of the majority would be binding upon the remaining two in whose favor judgment was rendered; such would be the effect of the plain import of the language of the statute.

The point here raised appears to be one of first impression. The Supreme Court of Montana has on two occasions had this section under consideration; in A. C. M. Co., v. B. & M. Co., 17 Mont. 519-522, the point was raised as to the right of the owners of a majority of the shares or interests in a mining partnership to bind the partnership, but the court dismissed the matter from consideration for the reason that, under the facts as stated in that case, the court held a mining partnership did not exist between the parties. The section was again before the court in Boehme v. Fitzgerald, 43 Mont. 226. The proposition before the court being as to whether the death of a mining partner dissolved the partnership, the decision being that such a contingency did not work its dissolution,

and expressly held that the partners owning a majority interest were entitled to the management and control; and it would appear that an accounting between the partners is the proper remedy for relief.

It is disclosed by the testimony in this case as appears in the statement, supra, that two of the parties, Frank Tamietti and John Pagleero, mined all of the ores in the territory in dispute after the alleged contract had terminated, and were paid therefor, and the point suggests itself that if Batt Tamietti and Gaido, the parties now before the court, have any cause for redress then, if a mining partnership actually existed between the parties, their remedy would be for an accounting and not an action at law against the company for loss of alleged prospective profits.

ASSIGNMENTS 1, 2, 5 AND 7.

LEASE OR LICENSE: STATUTE OF FRAUDS.

The evidence in this case, as disclosed in the statement of facts, does not prove a contract complete in its terms. There is a lack of mutuality, in that the so-called mining partners were not required absolutely to mine any of the ground which they claim was leased to them. The company under the terms of the alleged contract could not compel either specific performance of the contract or claim damages if the parties refused to fulfill their part of it. They were not obliged to do anything.

Furthermore, no time was specified for its performance, they did not have exclusive possession, and, as already pointed out, plaintiffs claim a sublease in the nature of a grant under an oral contract not evidenced by any note or memorandum in writing. This being true, it is our contention that the plaintiffs held under a license revocable at the pleasure of the licensor, and not as lessees or grantees of any part of the Goldsmith mine, and it is submitted that the contention we here advance finds universal support by the courts as well as the text writers.

A leading case, much cited by the courts, bearing upon the distinction between the effect of a license to enter lands uncoupled with an interest, and a grant is that of DeHaro vs. United States, decided by the Supreme Court in 1866, and since adhered to by all courts and text-writers who have dealt with the subject.

In that case the court laid down the following:

> "There is a clear distinction between the effect of a license to enter lands, uncoupled with an interest, and a grant. A grant passes some estate of greater or less degree, must be in writing, and is irrevocable, unless it contains words of revocation; whereas a license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it. There are also other incidents attaching to a license. It is an authority to do a lawful act, which, without it, would be unlawful, and while

it remains unrevoked, is a justification for the acts which it authorizes to be done. It ceases with the death of either party, and cannot be transferred or alienated by licensee, because it is a personal matter, and is limited to the original parties to it. A sale of the lands by the owner instantly works its revocation, and in no sense is it property discendible to heirs. These are familiar and well established principles of law, hardly requiring a citation of authorities for their vindication; but if they are needed, they will be found collected in the notes of 2d Hare & Wallace's American Leading Cases, commencing on page 376.* We are not aware of any difference between the civil and common law on the subject."

DeHaro vs. United States, 5 Wall, 599-627.

The same doctrine is incorporated in the text under the title "Mines and Minerals," 27 Cyc., page 690, and in the accompanying note in its support, both State and Federal, as well as English and Canadian cases are cited.

Among said decisions is that of Clark vs. Wall, 32 Montana, 219, upon which comment will be made hereafter.

Ruling Case Law, likewise draws the distinction between a lease of mines and a license to work the same, in the following language:

"97. License to Mine: Distinguished from a lease.—A distinction is drawn between a lease of mines and a license to work mines is that a lease is a distinct conveyance of an actual interest or estate in lands, while a license is a

mere incorporeal right to be exercised in the lands of another, or a profit a prendre, which may be held apart from the possession of the lands."

18 Ruling Case Law, page 97.

As to the requisites of a grant under a mining lease, it is laid down in Cyc:

"A mining lease authorizing the grantees to extract and appropriate minerals from the land is a grant of a part of the land, and must be executed in the same manner as a deed."

27 Cyc., page 692.

To the same effect is the text in California Jurisprudence, Vol. 17, title, Mines & Minerals, sections 100 and 101, and cases cited in support thereof:

"SEC. 100. LICENSES.—A clear distinction exists between a mining lease and a license has no permanent interest, property or estate in the land, but only in the proceeds thereof, as personal property, and his possession is the possession of the owner. A license is a mere personal privilege, which is not assignable. It does not create the relation of landlord and tenant, nor constitute a covenant running with the land, nor work a breach of warranty of title, but it is subject to revocation by the licensor, and is revoked by a conveyance of the owner's interest. A verbal license to mine for an indefinite time may be revoked at the will of the licensor, and constitutes no defense to an action by the licensor to enjoin the licensee from working the mine. A license, of course, is limited by the interest of the licensor."

"SEC. 101. EMPLOYMENT UPON SHARES.—A contract by which persons are

> engaged to work a mine in which they neither have nor thereby acquire an interest, for a share of the proceeds or a given price for ore taken out and delivered, is a contract of employment. Thus it has been held that a contract employing one to work in a mine and to take out and deliver rock to a mill, for one-half of the gross proceeds of each crushing, is a contract of employment under Section 1965 of the Civil Code, defining contracts of employment. Similarly, an agreement by a mining company, although in the form of a lease, giving the lessee a share of the proceeds for working the mine and bearing all expenses, except necessary improvements, is an agreement for working on shares, and the parties become tenants in common of the products taken out; such a contract, although denominated a lease, does not create the relation of landlord and tenant, but merely fixes a rule of compensation for services, being essentially a contract for labor to be paid for by a share of the proceeds."

In the case of Clark vs. Wall above referred to, the court had under consideration the effect of oral agreement authorizing the entry into a mining claim for the purpose of extracting ore therefrom during the plaintiff's will and pleasure, and with the understanding that the privilege should terminate whenever the plaintiff might desire.

The facts in the case referred to differ from those here alleged that in under plaintiff's complaint, claim is made to certain definite portion of the Goldsmith Mine, but the doctrine announced by our court in the Clark vs. Wall case we contend has peculiar

applicability to the present controversy between the parties to this action. The court among other things said:

> "What was the effect of the agreement under which the defendants entered into possession of the Modock Claim? The question can be determined without difficulty. The case of Wheeler vs. West, 71 Cal. 126, 11 Pac. 871, was an "action to perpetually enjoin defendantts from extracting and removing gold from the mining claim of plaintiffs." and the court said:
>
> "The verbal contract of February 14, 1883, as found by the court and jury, under which defendants were to enter and work a certain portion of the mine if they saw fit, and to exercise their own discretion whether they worked it or not, did not create the relation of landlord and tenant between them and the plaintiffs. The contract gave to them no greater right and had no more force in law than a verbal contract for the sale of the land would have possessed. Their right under such a contract was not in and to the realty, but to the gold, as personalty, when it should be severed from the land. Had it been in writing, it would have given to defendants merely an incorporeal hereditament, and, being verbal, it operated as a license to them to dig and mine for gold within the specified limits, which license protected them from a charge of trespass while in force, but was liable to revocation at the will of the licensors. There is a broad distinction between a lease of a mine, under which the lessee enters into possession and takes an estate in the property, and a license to work the same mine. In the latter case the licensee has no permanent interest, property, or estate in the land itself, but only in the proceeds, and in such proceeds not as realty, but as

personal property, and his possession, like that of an individual under a contract with the owner of land to cut timber or harvest a crop of potatoes thereon for a share of the proceeds, is the possession of the owner (Riddle v. Brown, 20 Ala. 412, 56 Am. Dec. 202; Frank v. Haldeman, 53 Pa. St. 229; Gillette v. Treganza, 6 Wis. 343; Grubb v. Bayard, 2 Wall, Jr., 81 Fed. Cas. No. 5849; Caldwell v. Fulton, 31 Pa. St. 483, 72 Am. Dec. 760; Doe v. Wood, 2 Barn & Ald, 719; Potter v. Mercer, 53 Cal. 667). The agreement was revocable at the will of the plaintiffs, and having been by them revoked before suit was brought plaintiffs were entitled to a recovery."

The authorities cited in the above opinion support the doctrine announced by the court, and we quote from Riddle v. Brown, supra: "A license merely—a verbal license—is the right to do a particular act, or a series of acts, without any interest in the land. Such a license will exempt a party from an action of trespass for entering the land of another to dig ore, and will give him the property in the ore which is actually dug under it (Doe v. Wood, 2 Barn & Ald, 724; 1 Crabb R. P. 96). But such a license is revocable at any time, at the pleasure of him who gives it." (See also Lindley on Mines, 2d ed., Sec. 860; William v. Morrison (C. C.), 32 Fed. 177.)

Clark v. Wall, et al., 32 Mont. pp. 219-227.

In a later case, that of Ivey v. LaFrance Cooper Company, 45 Montana, page 71, the facts alleged find some similarity to the facts in the case at bar. It was there contended that the plaintiff entered into an oral agreement with the defendants where-

by they leased and let to him a certain piece of ground under and within the Lexington Quartz Lode Mining Claim situated in Silver Bow County. Under the terms of the lease plaintiff was to clean out an old drift, retimber the same, extend it for a distance, if necessary, and cut an uprise to a place where ore would be encountered. After striking ore he was to have all he could take out for the succeeding thirty days.

It was contended that this so-called lease was void under the statute of Frauds and this point was conceeded by opposing counsel, for the court in its opinion says:

> "1. It is contended that the so-called lease, not being in writing, was void under the statute of Frauds. This position is taken on the authority of Clark v. Wall, 32 Mont. 219, 79 Pac. 1052, and the point seems to be conceded by counsel for the respondent."

At least five sections of the Revised Codes of Montana of 1921 have bearing upon the issues. They are: 7593; 7519, sub-division 5; 7939 of the Civil Code, and 10611 and 10613, sub-division 5, of the Code of Civil Procedure.

Section 7593 provides:

> "No agreement for the sale of real property, or any interest therein, is valid, unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or his agent, thereunto authorized, in writing; but this does not abridge the power of

> any court to compel the specific performance of any agreement for the sale of real property in case of part performance thereof."

Under this section it will be observed that the sole exception relates to the inherent powers of a court of equity to compel specific performance in proper cases. The exception can have no possible applicability to the case at bar. We are not proceeding here upon the chancery side of the court but are defending the law action for damages for breach of contract.

Sub-division 5, of Section 7519, reads as follows:

> "An agreement for the leasing for a longer period than one year, or for the sale of real property, or for an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged."

It will be noted here that only leases for a longer period than one year shall be in writing, the implication being that leases for a shorter period may be oral and valid, and plaintiffs, in the fourteenth paragraph of their complaint, seek to bring themselves within this exception, for they specifically allege that the ore body covered by their alleged lease and which they could have mined would have been mined by them within thirty days after they were ejected, and that all the ore to which they were entitled would have been mined by them within a

period of ninety days after the 16th day of January, 1922, the day on which their so-called sub-lease was cancelled.

The exception regarding a lease for a lesser period than one year is also found in sections 10611 and 10613, above referred to.

It should not be difficult to determine that the exception respecting leases adverted to cannot avail the plaintiffs in this action. The reasons are so glaringly apparent that it would seem that little argument is necessary and the citation of authorities much less so to show the fallacy of plaintiff's position. They do not claim a lease as that term is generally understood, that is to say, under a right to the possession and occupancy of premises for a term to be returned without substantial dimunition or destruction of the freehold at the end of the term, but they do claim a specific grant or a part of the land itself which involves an utter destruction of that part of the fee simple estate covered by the alleged lease.

The authorities adverted to above point out this distinction, but the following succinct statement by the Circuit Court of Appeals of the Eighth Circuit, in Westerling v. Black Bear Mining Company, 203 Fed. pp. 599-604, makes the distinction quite clear:

> "An ordinary lease for years grants nothing but the occupancy and use of the premises and requires their return without substantial diminution of the property of its value at the end

of the term. But this mining lease is not of that class. It conveys the right to take from the body of the property all its value and to leave it at the end of the term a worthless shell.

A mining lease is a grant in presenti of all the minerals in the land—these minerals being part of the realty—with the right to enter and search for them and to mine and remove them when found" Brewster v. Lanyon Zinc. Co., 140 Fed. 801, 807, 72 C. C. A.

203 Fed. pp. 599-604.

Under the title "Licenses," in 17 Ruling Case Law, p. 506, the rule is again laid down that persons who have the privilege of entering on the land for a definite purpose, and whose payments for the use of the land are determined by the quantities of materials obtained are licensees and not tenants, and on page 570 the distinction drawn by the courts between mining leases and licenses is thus set forth:

"A clearly defined distinction is drawn by the authorities between agreements which create a lease of the land for mineral purposes and those which are simply a license giving to the licensee authority to enter and operate for minerals. While under a lease an interest or estate in the land itself is created, under a license the licensee has no interest or estate in the land itself, but only in the proceeds, and in such proceeds, not as realty, but as personal property, and his possession is the possession of the owner. In general, a contract imply giving a right to take ore from a mine, no interest or estate being granted, confers a mere license, and the licensee acquires no right to the ore until he separates it from the freehold."

17 Ruling Case Law, p. 57, Sec. 83.

Section 860 of Lindley on Mines reads, in part, as follows:

> "Licenses and their distinguishing attributes. A license is an authority to go upon the land of the licensor to do an act or series of acts there, but passes no estate or interest in the land.
>
> It is technically an authority to do something on the land of another without passing an estate in the lands, while the latter confers a mere incorporeal right, to be exercised in the lands of others. * * *
>
> A mere grant of a right to take ore, no estate or interest in the land being granted, is a license only, and is not exclusive of the licensor, unless the expressed intention of the parties is otherwise, or the implication is so clear and strong as to be unavoidable.
>
> A license is revocable, and its continuance depends upon the will of the grantor."
>
> Lindley, Third Edition, Vol. 3, p. 2129, Sec. 860.

Notwithstanding plaintiffs' claim that they hold under a parole grant in the nature of a lease the foregoing authorities clearly establish their rights as licensees and not as lessees for the relationship of landlord and tenant never did exist.

The leading Montana authority on the rights of a licensee and the authority of the licensor to determine the license at his pleasure is that of Great Falls Water Works Company against Great Northern Railroad Company, found in 21 Montana 487, the opinion of the court being by Mr. Justice Hunt.

That was an action for injunction to restrain the Railway Company from tearing up certain water mains laid by plaintiff from its pumping station on the Missouri River to connect its general water system at the city of Great Falls. The case in the lower court was tried before Judge Leslie, who found in favor of the plaintiff, but the cause was reversed.

The Water Company, it appears, had a franchise with privilege of laying mains in the streets and alleys of the city. They held under a deed but claimed an oral modification whereby they were permitted to change the course thereafter adopted by them, and did so change it. The Railway Company. being the owner of the fee, undertook to tear up the water mains of the Water Company where they crossed its property.

The Supreme Court, after laying down the proposition that the decision of the trial court in effect granted an easement to the Water Company without deed, and in violation of the statute of Frauds, laid down the following propositions, which have become the recognized rule of law in this jurisdiction:

> "There has been much contrariety of decision in the courts of different states and jurisdiction. But the courts of this state have upheld with great steadiness the general rule that a parol license to do and act on the land of the licensor, while it justifies anything done by the licensee before a revocation, is, nevertheless, revocable at the option of the licensor; and this,

although the intention was to confer a continuing right, and money had been expended by the licensee upon the faith of the license. This is plainly the rule of the statute. It is also, we believe, the rule required by public policy. It prevents the burdening of the lands with restrictions founded upon oral agreements, easily misunderstood. It gives security and certainty to titles, which are most important to be preserved against defects and qualifications not founded upon solemn instruments. The jurisdictions of courts to enforce oral contracts for the sale of land is clearly defined and well understood, and is indisputable; but to change what commenced in a license into an irrevocable right, on the ground of equitable estoppel, is another and quite different matter. It is far better, we think, that the law requiring interests in land to be evidenced by deed should be observed than to leave it to the chancellor to construe an executed license as a grant depending upon what, in his view, may be equity in the special case.

Now, the sequence of the rule that an easement can only be created by deed is that a license which merely renders lawful an entry which otherwise would be unlawful cannot, except by prescription—which is equivalent to a deed—become an absolute right in property without practically doing away with the statute of frauds, and completely overturning the common-law rule, as pointed out by Baron Alderson in Wood v. Leadbitter, supra; Browne, Statute of Frauds, Sec. 29.

An extended examination of cases bearing upon the doctrine of the revocability of parole licenses has impressed upon us the belief that the sound, the logical, as well as the safe, reasoning, sustains the rule that a parole license of the character of the one under consideration

is always revocable at the pleasure of the licensor, so far as any further enjoyment of the privilege extended goes. Freeman's note to Lawrence v. Springer, supra. Modern text-writers, deducing principles from the more recent opinions of the courts, have taken this view of the subject; and to give that security to titles so essentially important in affording protection against flaws, and burdens not imposed by writing, but resting upon verbal permissions or agreements, it is well settled that the doctrine of estoppel is inapplicable, 'inasmuch as the licensee is bound to know that his license was revocable, and that in incurring expense he acted at his own risk and peril.' Browne on St. Frauds (5th Ed.), Sec. 31; Jones on Easements, Sec. 69."

Great Falls Water Works Company v. G. N. Ry. Co., 21 Montana, pp. 487, 506.

The principles of the Great Falls case were again reiterated in the later case of Archer v. C. M. & St. P. Ry. Co., 41 Montana, p. 56.

In the Archer case the right of the plaintiffs to maintain a dam and ditch upon certain lands acquired by the Railroad Company for right of way purposes by deed from the owners was denied because the facts showed that while the plaintiffs had constructed their dam and ditches at considerable toil and expense and had maintained the same for a number of years, still their possession was that of licensees merely, because at its inception the right of plaintiffs was merely resting in parole and was

not coupled with an interest in the land itself. Further, that the license may be terminated without notice, with the single exception that where the licensee has movable property on the premises he should be given a reasonable notice of the revocation of the license and an opportunity to remove the property.

The facts in the case of Wheeler against West, 11 Pac. 871 (Cal.), were in the essential features similar in legal effect to the facts pleaded and attempted to be proven in the case at bar. The case was decided in 1866, and quoted from at length in the case of Clark v. Wall, supra, 32 Mont. 219, 224. The Wheeler case was before the Supreme Court of California on a second appeal, because after it was reversed, the defendants amended their complaint and plead the contract **in haec verba.** In the trial court the essential elements of the alleged contract were stricken on motion and the court reaffirmed its former decision, holding the contract to be a mere license.

Wheeler v. West, 20 Pac. 745.

In Hudepohl v. Liberty Hill Consolidated Mining, etc., Co., 22 Pac. 339, the Supreme Court of California again had before it a similar question. This case was decided in 1889. It was an action on a promissory note. The defense was lack of consideration. Plaintiff had judgment and defendant appealed. The court found that the defendant, being

a corporation, entered into a contract in writing with the plaintiff and one Buckman through its superintendent. To show the similarity of the contract in that case with that now before the court, we here set it out for the convenience of the court:

> "Know all men by these presents: That I, S. Wheeler, superintendent of the Liberty Hill Consolidated Mining & Water Company, for and on behalf of said company, have leased, and by these presents do lease, to C. Hudepohl and B. S. Buckman, for the term of one year from the date hereof, the right and privilege to work and mine the ground at or near Little New York in Nevada County, Cal., known as the 'Empire' and "Manzanita' claims, on the following terms and conditions, to wit: The said Liberty Hill Company to make all the improvements necessary for commencing and carrying on the work of mining. Said improvements to consist of putting in flumes and under-currents in Scott's ravine, and a short piece of flume in the Big Tunnel, emptying into said ravine; to furnish sufficient iron pipe and hydraulic machines, and all the water in what is known as the 'Lower Bear River Ditch'; in consideration for which the said Hudepohl and Buckman are to work and mine the said ground in an energetic and workman-like manner, bearing all the expenses for the same, and to have and receive one-half of all the gross products thereof, including lease of cuts, tunnels, flumes, and bed rock, which they may have run through and over during the existence of this lease. The other half of such gross product to be paid over to the said Liberty Hill Company immediately on clean-ups or leases or sales being made. Prior to each and every clean-up being made, the su-

> perintendent of the Liberty Hill Company shall be notified thereof in time to be present if he choses and he shall have the custody of all the bullion and the other product until a division be declared. In witness hereof I have hereunto subscribed the name of the corporation, this October 10, 1881."

The defense was that the contract was never ratified by the stockholders of the company; that the plaintiff and Buckman worked the mines described in the contract and delivered the bullion to Wheeler, the superintendent, who deposited it with the bankers, and drew on them to pay the expenses of mining, including wages of hired help, and when they ceased working there remained in the hands of the superintendent a sum of money, being plaintiff's half of the proceeds of the mines taken out by them, and that the note sued upon was given for that sum instead of delivering to them the money or bullion itself; that the officers of the corporation were authorized to execute the note; that Buckman assigned his interest in the note sued on to the plaintiff before the suit was commenced.

The court did not decide the question as to whether the contract required the ratification of the stockholders fo the company, and in disposing of the point laid down the following propositions of law:

> "If the agreement be construed to be a lease of the real estate of the defendant, it may be conceded that the point made against its validity would be well taken; but we do not regard

it as a lease. It is true the parties so term it in the instrument itself, but that cannot affect its legal construction. As we construe the agreement, it was one for the working of the mine on the shares, and the parties became tenants in common of the products of the mine when taken out. Bernal v. Hovious, 17 Cal. 545; Smyth v. Tankersley, 20 Ala. 212; Ponder v. Rhea, 32 Ark. 435; Somers v. Joyce, 40 Conn. 592; Scott v. Ramsey, 82 Ind. 330; Dinehart v. Wlison, 15 Barb. 597; Aiken v. Smith, 21 Vt. 172; Haywood v. Rodgers, 73 N. C. 320. Such a contract does not create the relation of landlord and tenant, but fixes a rule of compensation for services rendered. It is, in all its essential features, a contract for labor to be performed and to be paid for by a share of the profits realized from such labor. Civil Code, Sec. 1965; Crowley v. Mining Co., 55 Cal. 273; Gardenhire v. Smith, 39 Ark. 280; Jester v. Penn. 28 La., Ann., 230; Adams v. McKesson's Ex's., 53 Pa. St., 81; Hoy v. Gronovle, 34 Pa. St., 9."

The doctrine of the Hudepohl case was recognized as sound law as late as 1917 by the Court of Appeals of the Second Circuit, in re Seward Dredging Co., 242 Fed. Rep. 225. In that case it appeared that the dredging company was a bankrupt and owned a placer mining property in Alaska, which for the purpose of a decision was treated as real estate. The bankrupt had made a contract with one Estabrook to the effect that he should take possession of the mine, furniture, machinery and material to work it and himself extract gold, keeping accounts of receipts and expenditures; at the end of the first

summer's work Estabrook was to have the right or option of enlarging and continuing his operations on a royalty basis, but if he didn't find the enterprise to his liking, the contract was then to terminate, the accounts between the contracting parties were to be stated on certain terms, whereby the cost of operation should be credited to Estabrook and the gold recovered credited to the bankrupt. If the balance was against Estabrook, he was to pay the same to the bankrupt, but if the value of the gold was less than the cost of plant and operation the bankrupt was to pay Estabrook the difference and thereupon all of the improvements were to become the property of the bankrupt. Estabrook didn't exercise his option to continue operations; that while he did operate, the gold recovered didn't equal his expenditures and the difference was not paid by the bankrupt, who before bankruptcy resumed possession of the property; that Estabrook failed to remove his machinery therefrom, which passed to the physical possession of the trustee in bankruptcy, and into the custody of the bankruptcy court. Estabrook's property at the mine consisted in large part of chattels, one of them being an oil burning combustion engine, which was bolted to a concrete bed contained within a house. The trustee in bankruptcy, having refused to surrender any of Estabrook's apparatus, he filed his petition to compel delivery to him of the chattels, the contention being that if

he were entitled to the engine he would be enitled to all. The District Court of the United States for the Southern District of New York gave him the relief prayed for, and upon appeal to the Circuit Court it was held:

> "It is not true that the contract between Estabrook and the bankrupt was a conveyance in the sense that it transferred anything that could be called realty or constituted a lease. An agreement exactly similar in legal effect was held not a lease, and no more than a contract for labor to be performed, merely fixing compensation for services rendered, in Hudephol v. Mining, etc., Co., 80 Cal. 553, 22 Pac. 339, in which case the document considered was called a lease by the parties, a fact taken into consideration merely as evidence of ignorance. There, as here, the contractor was formerly given possession of the mine, a fact which made him no more than a licensee.'
>
> In re Seward Dredging Co., 242 Fed., 225, 228.

Indeed, the doctrine we contend for appears to be now so firmly established that in the case of Michalek v. New Almaden Co., from which we have so extensively quoted above, it was admitted at the trial that the contract involved evidenced a license and not a lease. Citing DeHaro v. United States, 5 Wall, 599, 627, 18 L. Ed. 681.

The case of Shaw v. Caldwell, 155 Pac. 941, was heard by the District Court of Appeals, Third District, California, in 1911, and a rehearing denied by the Supreme Court of that state. It follows the

earlier decisions of that state to the effect that a license is nothing more than a personal privilege, is revocable at the pleasure of the licensor, and even where it is created by a written instrument or conferred by deed, it does not affect the rule of revocability at the option of the licensor. Citing 25 CYC. 644. It is not here necessary to dwell upon the facts in that case, but the court, after reviewing the facts, thus discriminates between a license and a lease:

> "The situation is clearly brought within the definition of a license in respect to real estate, which is an authority to do a particular act or series of acts upon the land of another without possessing an estate therein. 25 CYC. 640. The test to determine whether an agreement for the use of real estate is a license or a lease is whether the contract gives exclusive possession of the premises against all the world, including the owner, in which case it is a lease, or whether it merely confers a privelege to occupy under the owner, in which case it is a license, and this is a question of law arising out of the construction of the instrument."
>
> Shaw v. Caldwell, 115 Pac. 941-943 (Cal.).

Question: Did the alleged contract under which recovery is here sought give to the parties exclusive possession of the premises against all the world, including the owner, or did it confer a privilege to occupy under the owner? The statement of the case as pointed out contains all of the evidence pertaining to the alleged contract between the parties, denominated a lease. They entered the premises

to mine certain designated territory upon a royalty basis. Thy were first to sink a winze 15 feet down, which was already 35 feet deep. They then had the right to extract all the ores found on both sides, east and west, from the depth of 50 feet up to the 500 foot level, and if they worked north or south they would have a right to take out any ores there found also. They were to mine all of the ores as far as it went. The company was to furnish machinery, tools, supplies, etc., and to hoist the ore and waste from the 500-foot level. After sinking in the winze to about 45 feet, they struck ore and continued to sink to a depth of about 51 or 52 feet, which was deeper than the contract called for. Alderson, the superintendent, generally went down every day. The ore was going down and they asked permission of Alderson to sink deeper on the lead, and Alderson said, "Sure, he said, down in this winze," he said, "until the ore is gone; the more you sink the more ore you are going to have up over your head, and you fellows are going to make money and the company is going to make money (Tr. 57-127). So they sank until they were 75 feet deep, when they came to a fault, and, according to Batt Tamietti, the partners agreed to sink no further and that it would be better to notify Alderson that they intended to quit, and did notify him, but Alderson went down the next day and gave them directions concerning the sinking of a sump, and then extracting

the ore east and west from the lead (Tr. 57-58). Gaido's testimony is of like import, as is that of Monzetti. The testimony, we submit, if it proves anything, proves positively that the alleged partners did not receive a grant of any part of the mine. Certainly not in any sense as alleged in the complaint; that is to say, from the 500 foot level 50 feet downward and easterly and westerly along the lead to the east boundary of the mine, and westerly to the west boundary line of the mine; but in such parts of the mine as Alderson, the superintendent and manager, directed. Their possession, instead of being exclusive against all the world, including the owner, clearly discloses that it was in subordination of the owner and at such places in the mine as the owner from time to time directed. They occupied under the owner with the privilege of working such parts of the mine and such only as the owner designated, and that the parties didn't feel themselves bound by any mutual contract while they were working in the mine is amply demonstrated by the testimony of Batt Tamietti, above referred to, that they notified the manager, Alderson, that they were going to quit after having struck the fault, after having sunk the winze 75 feet below the 500-foot level of the mine.

When this cause was tried, Alderson, the manager, was dead. The company could not combat the contentions advanced by the alleged partners, and it is

submitted that under conditions such as arose in this case, the so-called partnership might with equal propriety have claimed the whole mine. We submit they had only a working agreement in the nature of a license, such as it is the custom in the mining districts of the northwest to give to miners. Such contracts are more alluring to the miner than a fixed daily wage. Experience has demonstrated that miners working for wages are often more solicitous for their own comfort and welfare than for that of the employer, but where they have a working agreement which gives them a share of the profits, it spurs them on to greater effort, both for their own material benefit and profit to the employer. The contract contended for being one involving the corpus of the property itself, is void under the statute of frauds.

In addition to the authorities already cited, we call attention to the early case of Hirbour v. Reeding, 3 Mont. pp. 15, 20, decided in 1877, wherein our court having under consideration the question of the statute of frauds, held that as between the members of a partnership they may contract orally with each other, but as between the partnership and third persons the statute of frauds in all cases operates.

We quote from the opinion as follows:

> "The Supreme Court of Indiana holds in Holmes v. McCray, 51 Ind. 358, that a parol agreement for a partnership for the purpose of dealing in lands is not within the statute of

frauds. Chief Justice Biddle, in the opinion, says: 'As between the partnership and its vendors, or vendees in the sale or purchase of lands, the statute in all cases would operate, but as between the partners themselves, when they are neither vendors nor vendeses of one another, we cannot see how the statute can affect their agreements.'

"In New York, the same views are announced in Chester v. Dickerson, 54 N. Y. 1, and Fairchild, 65 id. 471. Chief Justice Wade, in his concurring opinion, quotes from the opinion of the court in Chester v. Dickerson, supra, and this reference is therefore sufficient."

Hirbour v. Redding, 3 Mont. 15-20.

As already pointed out, the authorities hold strictly to the doctrine as laid down by this court in Kjelsberg v. Chilberg, 177 Fed. 110-112, that "a lease of a mine is a grant to the corpus of the property. It confers the right to take out a part of the value of the property."

Not only did the so-called partnership fail to produce any note or memorandum, in writing, of the contract, but under the instructions of the court (Tr. 192-193) the plaintiffs were required to prove their entire case by a preponderance of the evidence.

Th contract, whatever its import, was made with the agent Alderson. If the contract itself was required to be evidenced by some note or memorandum in writing, then the authority of Alderson to enter into it was also required to be in writing.

Section 7939 of the Revised Codes of Montana, 1921, provides as follows:

> "7939. Form of authority. An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing."

Corporations are bound only by such agreements as are made by its governing body and by its agents thereunto duly authorized express authorization must be shown to have been given.

> Kirkup v. Anaconda Amusement Co., 59 Mont. 460-482-3, 2 Fletcher on Cor. S. 1242;
> Berlin v. Bell Isle Scenic Co., 105 N. W. 130 (Mich.);
> M. L. Ins. v. Robinson, 49 N. Y. S. 887;
> Moore v. Skyles, 33 Mont. 146;
> Trent v. Sherlock, 24 Mont. 255;
> Butte & B. v. MOP., 21 Mont. 529.

Throughout the transcript it will be found that all testimony went in over the objections of counsel for the company, and exceptions were reserved. However, they are not included in the assignment of errors for we deem that under Specification No. 1, being the motion for a directed verdict, and the remaining specifications, the entire record is before the court for review. The points we now urge were presented to the trial court and we have have great deference for the learned manner in which the Honorable Charles N. Pray, trial judge, disposed of the

case. However, it is quite manifest that a trial court sitting with a jury, and especially one presided over by a judge newly appointed, has not the time to give serious problems of law the consideration which they justly merit. The court, in deciding to permit the case to go to the jury, was influenced, we believe, by the decision of Pelton v. Minah Consolidated Min. Co., 11 Mont. 281, and the case of Kjelsburg v. Chilberg, a case decided by this court and reported in 177 Fed. 109. We are prompted to this conclusion because these cases, as our recollection serves us, were the ones relied upon by counsel for the alleged co-partners at the trial. At first blush they appear to support the contentions advanced by counsel for the alleged partnership, but upon analysis it will be found that neither of them is at all in point, In the Pelton case there was a written contract, while the contract here sued upon rests in parole. That contract was for a definite term of one year, while in the case at bar no term is specified. In that case the contract was for the exclusive possession of a mine, while here the contract was only for such portions of a vein in the mine as its superintendent from time to time designated, and was at all times under the superintendency and control of the mine manager. There the lessee assumed to exercise absolute dominion and control over the mine; the lessee there was in complete and undisturbed possession, while here possession was under

and in subordination of the company. With these distinctions in mind, the court properly held the instrument before it in that case to be a lease, since it contained all of the elements which constitute a lease of a character common to the mining regions of the state of Montana, and contained no provisions or conditions whereby it could be held to be a contract of any other nature.

Pelton v. Minah Con. Min. Co., 11 Mont. 281.

The Kjlsburg case is likewise not in point. The statement of facts discloses:

> "The defendant in error brought an action against the plaintiff in error to recover damages for breach of an agreement to lease to the defendant in error a certain placer mining claim belonging to the plaintiff in error. The plaintiff alleged that the parties to the contract had been co-partners in business at Nome, Alaska; that they dissolved their partnership, and in part consideration of the surrender by the defendant in error of his interest in the co-partnership, the plaintiff in error agreed to execute to him a lease of the mining claim for one year upon a royalty of forty per cent; that the plaintiff in error failed and refused to execute the lease, and instead thereof executed a lease of the claim to another, so that the defendant in error was prvented from working the said claim; that the defendant in error could and would have extracted from the ground, over and above the royalty to be paid to the plaintif in error, and the necessary expenses of working the mine, gold dust of the value of $50,000.00. For that sum he demanded judgment. On the trial

before a jury, verdict was returned for the defendant in error in the sum of $2,000.00, for which judgment was rendered.

"The plaintiff in error contends that there was not contract proven by the record which would entitle the defendant in error to damages for its breach. There was no motion for an instructed verdict. There was no testimony to contradict in any way the testimony of the defendant in error as to the terms of the contract. He testified that the plaintiff in error said, 'I will make you out a lease of the Metson Bench'; that the terms were that the royalty was to be 40 per cent, and that the lease was to commence on the first of September, 1905, and run to the middle of June, 1906. This was sufficient evidence of the term of the lease. Under the instructions of the court, the jury found that the contract to give the lease had been made as alleged."

From the foregoing statement it is quite apparent that there was an absolute contract between the parties to make and execute a lease and not a license. The term was specified and it was for less than one year, and therefore the statute of frauds could not be held to apply. It was for an entire mining claim and we must assume that it was for the exclusive possession thereof in the lessee, as against all the world, including the lessor. The testimony was uncontradicted that the plaintiff in error said, "I will make you out a lease of the Metsen Bench." The rent was specified (i. e. royalty) and the term was fixed.

Kjelsburg v. Chilberg, 177 Fed. 109.

As said in Shaw v. Caldwell, supra, the above case shows that the lessor was to give the lessee exclusive possesion of the premises against all the world, including the owner, and this court could not therefore find otherwise than that the plaintiff in error was guilty of breach of contract for failure to execute a lease and was therefore amenable in damages to the defendant in error, for the value of his bargain. The points we urge in the case at bar were not before the court in that case. There was no motion for an instructed verdict.

ASSIGNMENT NO. 2.

Error is here predicated upon the refusal of the court to give the company's proffered instruction to the effect that the contract sued upon is in all essential features a contract for labor to be performed, and to be paid for by a share of the profits from such labor, and that the plaintiffs in the case had been paid for all of the labor performed by them under the contract, except $11.43, due, owning and unpaid to Pete Gaido, and a like sum to the plaintiff, Batt Tamietti, which sums, with accrued interest had been paid to the clerk of the court for the use of the plaintiffs, prior to the trial, and that therefore a verdict should be rendered for the company.

As pointed out in the statement at least three of the parties regarded the contract as one for labor

to be performed and to be paid for by a share of the profits of the venture. Indeed, Frank Tamietti expressly referred to it as a working agreement which was terminated on the 16th day of January, 1922 (Tr. 172), and, on the same page, testified: "We got fifty feet more ground than we asked for."

It will be observed by a reference to the cases cited under the assignment "Lease or License: Statute of Frauds," supra, that the Supreme Court of California, as well as other courts, including the Supreme Court of Appeals of the Second Circuit, hold such contracts in all essential features to be a contract for labor to be performed.

> Hudepohl v. Liberty Hill Con. Min. & Water Co., 22 Pac. 339;
> In re Seaward Dredging Co., 242 Fed. 225.

The California courts hold such contracts to fall within the definition of section 1895 of the Civil Code of that state, which is identical with section 7756 of the Revised Codes of Montana, of 1921, which section reads as follows:

> "7756. Employment defined. The contract of employment is a contract by which one, who is called the employer, engaged another, who is called the employee, to do something for the benefit of the employer, or of a third person."

Such a contract may be terminated at the will of either party as provided by the terms of section 7789

of the Revised Codes of Montana of 1921, which reads as follows:

> "7789. Termination at will. An employment having no specified term may be terminated at the will of either party, on notice of the other, except where otherwise provided by sections 7756 to 7809 of this code.'

None of the exceptions contained in this section having any application whatsoever to the case at bar.

It is true that whether in a given instance a contract is to be construed as a contract of employment or as a lease is, under the authorities, to be determined by the terms of the contract itself, its object and the intention of the parties as gathered from the circumstances surrounding the transaction.

26 Cyc. 975.

But as pointed out, supra, the contract sued upon in this case cannot in any sense be a lease. The provisions of the Statute of Frauds were not complied with, and because this is not an equity action seeking relief upon the ground of part performance sufficent to take the case out of the statute, the law presumes that the parties entered into the alleged contract with a full understanding of the law's requirements regarding contracts which must be evidenced by some note or memorandum in writing having dealt orally anent the transaction it is presumed that the parties intended the contract to be a license rather than an inerest in the corpus of the mine.

Howe's v. Barmon, 81 Pac. 48 (Idaho).

Indeed, plaintiffs proofs show beyond cavel that the contract was nothing more or less than a license to enter the mine under a working agreement, the compensation to be a share of the profits. That the relationship of master and servant at all times existed between the company and the so-called partnership is demonstrated by plaintiffs' exhibits of the smelter returns (Tr. 61 to 88, inc.). Thus we find the following deductions from the "leasers" share of the proceeds on different cars shipped:

> Hospital dues, 6 persons, $6.00; Industrial Accident, 6 persons, one-half month each, $7.80 (Tr. 65).
>
> Industrial Accident and Hospital dues for 6 persons for October, $21.60 (Tr. 68).
>
> Hospital dues, 6 persons, November, $6.00; Industrial Accident, 6 persons, November, $15.60 (Tr. 71).
>
> Hospital dues, $6.00; Industrial Accident, 6 persons, $15.60; total, $21.60 (Tr. 18).
>
> Hospital dues, 6 persons, $6.00; Industrial Accident, 6 persons, ½ month each, $7.80 (Tr. 82).

But one deduction may be drawn from this testimony: It is that the company carried Industrial Accident Insurance and made provisions for hospital services for the so-called partnership. These matters were not a part of the original contract as testified to by the parties. If they operated under a mining lease, it was not incumbent upon the company to make provision for industrial accident in-

surance or hospital dues, and we must assume the company was not charitably inclined to do so, but that these provisions were made solely by reason of the obligation imposed by law upon the employer to insure his employees and to private hospital service under the provisions of the Workman's Compensation Act, making it obligatory upon the employer to do these things for the employee.

The measure of damages in cases such as this is for work, labor and services performed, the remuneration being disclosed by the smelter returns. In this case it appears from the returns that Tamietti received as his share nearly $1,500.00 and Gaido over $1,500.00, and that only the small balance paid into court for their use and benefit remained unpaid.

In the Michaelk case, supra, the relief was wholly denied for work, labor and services which had been performed, because the suit being by the partnership and the proof having failed to disclose a mining partnership, there was a fatal variance. In the case of Clark v. Wall, supra, the court held the measure of damages in a case involving a verbal license to be governed by the property right in the ore which has actually been dug under the license. In the case of Ivy v. LaFrance Copper Company, 45 Mont. p. 71, the doctrine announced in the Clark v. Wall case was affirmed and recovery limited to work, labor and services on ore knocked down prior to the revocation of the contract. In this case the plain-

tiffs claimed no right to the ore in place but only to a share of the net proceeds after it had been mined, and even though the proof shows that some additional work was done and time and labor expended in mining of the alleged ore body, the courts uniformly hold that recovery may not be had.

> Note to Pifer v. Brown, 49 L. R. A. 497, and note to Keager v. Tuming, 19 L. R. A. (N. S.), p. 700.
>
> See also, Riddell v. Brown, 56 American Decisions, p. 202 (Ala.) wherein the court stated:
>
> "Such a license will exempt a party from an action of trespass for entering the land of another to dig ore, and will give him the property in the ore which is actually dug under it: Doe v. Wood, 2 Barn & Ald. 724, Crabb R. P. 96. But such a license is revocable at any time ,at the pleasure of him who gives it."

Where defendant admitting plaintiffs' damages in a certain amount has paid such amount into court, and it is enough to cover the reasonable damages therefor, non-suit is proper.

Harrington v. Moore Land Co. 59 Mont. 421.

It is respectfully submitted the court erred in refusing to give this proffered instruction.

ASSIGNMENT 3-4-6-7.

ON THE RIGHT TO RECOVER MORE THAN NOMINAL DAMAGES:

These specifications may be considered together. The third refers to the deposit in court covering

moneys due Gaido and Batt Tamietti and defines nominal damages and restricts the jury to awarding the parties nominal damages only.

The fourth is on the proposition that the evidence fails to disclose that the plaintiffs could or would have prosecuted their alleged contract to completion at a profit to themselves, and that they must therefore find for the defendant.

The sixth specification is the exceptions to the charge of the court and covers the ground set forth in specification 3.

In view of the contentions already advanced in this brief, we deem it unnecessary to discuss these alleged errors at length, and we trust the court will dispose of this controversy without being called upon to consider these errors. However, should the court be inclined to deem it necessary to consider them, then we say that under the law of the case as laid down by the court and to which reference is made in the statement, supra, the plaintiffs have failed to prove a case to sustain the judgment rendered in their favor.

The court's instruction in this regard may be illuminated by a reference to what this court said in the Kjelsberg case:

> "Error is assigned to the instructions to the jury in which they were told in substance that the rule of law is that where the lessor has title, and for any reason refuses to lease the premises agreed upon, he shall respond in damages and make good to the lessee whatever he may have lost by reason of his bargain, and that the

lessee would be entitled to such profits as would have been derived from the premises, for the full period of the term for which the lease was to be made, and that proof of the profits may be made by showing what profits were made under a like lease of the same property to other parties, if the proof further shows that the party who was to have the lease would have worked the premises practically in thesame manner as the persons did who worked the same. We find no error in the instructions so given. In the case of a wrongful breach of a contract to lease houses or land, the measure of damage to the plaintiff is easy of ascertainment. It is the reasonable value of his contract, and not the profits which he would have made if the agreement had been carried out. It is well settled that where one contracts to grant a lease, well knowing that he has not title or where he puts it out of his power to grant the lease by giving a lease to a third person, the other party to the contract may recover as damages the value of his bargain. Robinson v. Harman, 1 Exh. 850; Ford v. Tiley, 6 B. & C. 325. And other damages, which are the direct and natural consequences of the breach, may be recovered in addition to the value of the bargain. Driggs v. Dwight, 17 Wend. (N. Y.) 71, 31 Am. Dec. 283; Wolf v. Studebaker, 65 Pa. 459; Hall v. Horton, 79 Iowa, 352, 44 N. W. 569; Hanslip v. Padwick, 5 Exch. 615.

More analagous to the case at bar, however, are the cases of croppers' leases, where land is let or agreed to be let to be formed on shares. In such cases the profits which the lessee might have made are often taken into consideration in determining the measure of his damages for a breach of the contract. Depew v. Ketchum,

75 Hun. 277, 28 N. Y. Supp. 8; Taylor v. Bradley, 39 N. Y. 129, 100 Am. Dec. 415; Bowers v. Graves & Vinton Co., 8 S. D. 385, 66 N. W. 931; Rice v. Whitmore, 74 Cal. 619, 16 Pac. 501, 4 Am. St. Rep. 479. In Depew v. Ketchum it was held that the measure of the lessee's damages was the value of his term surrendered, based upon the capacity of the farm to yield a profit to one working under the contract. In Taylor v. Bradley, the court said:

'To my mind the only rule which can be prescribed and the only rule which will do justice to the parties, is that the plaintiff is entitled to the value of his contract. He was entitled to its performance. It is broken. He was entitled to is deprived of his adventure. What was this opportunity, which the contract had apparently secured to him worth? To reap the benefit of it, he must incur expense, submit to labor and appropriation of his stock. His damages are what he lost by being deprived of his chance of profit.'

Kjelsberg v. Chilberg, 177 Federal, pp. 109-112.

As pointed out in the statement, two of the plaintiffs, Frank Tamietti and John Pagleero, mined all of the ores remaining in the disputed territory after the 16th day of January, 1922, the day upon which the alleged contract was terminated, and removed therefrom three cars of commercial ore, and the court by its instructions limited the right of Gaido and Tamietti to recover one-fifth (1/5) interest each in the net profits, if any, derived from those three cars that would accrue to them after deducting all

expenses incident to mining same, and that the burden rested upon the plaintiffs that they could and would have mined that ore not at a loss but at a profit to themselves, after deducting the cost of mining (Tr. 196-197).

Now, a reference to plaintiffs' exhibit Q (Tr. 158-163) discloses that the miners who did mine the three cars received as their gross shares on the first car $988.00 (Tr. 159); on the second car $1986.05 (Tr. 161); on the third car $1,006.74; totaling $2,980.79.

An inspection of exhibit Q discloses that the miners did not receive all of the above sum because deductions were made which we will not here attempt to compute, yet they amounted in all to more than two hundred ($200.00) dollars; but, eliminating the deductions from consideration, the one-fifth part of the gross share of the miners is $596.16. Under the court's instructions, Gaido and Tamietti would be entitled to no more than $596.16 each, had the contract not been cancelled, but the instructions go furthere and inform the jury that Tamietti and Gaido if enitled to recover, at all, would be entitled to recover only on the net profits after deducting the cost of mining.

The record is silent as to the length of time required to mine these three cars. The record is silent as to whether Gaido and Batt Tamietti could and would have mined the same practically in the same manner as the persons did who worked the same,

which is one of the tests laid down by this court in the Kjelsbuerg case.

Gadio testified that in his opinion it would take about thirty (30) days to have stoped out the ore left in the in the hanging wall of the lead, and about forty or forty-five days to take out the ore from the foot wall lead, with six men working (Tr. 126).

Now the law is that to reap any benefit the plaintiffs must have submitted to labor. Their net profits would be the difference between two-fifths of the gross yield and two-fifths of the cost of the work and labor necessary to mine the ore, and the cost of work and labor would be the established scale of miners' wages.

There is nothing in the record to indicate that these parties could have earned miners' wages in mining the ore had they been permitted to do so.

There is nothing in the record to show whether or not these parties worked elsewhere during that period and earned miners' wages. If they did they were not damaged at all, unless for the difference between the goings miners, wages during the period required to mine the ore and the gross returns to the miners who mined the same; hence, the verdict was based purely upon speculation and conjecture, for it is only for such profits that the plaintiffs were entitled to recover, if at all, under the instructions of the court (Tr. 197-198).

In a case where the facts were essentially simi-

lar to the facts in the case at bar, plaintiffs had judgment in the trial court, but the Supreme Court of Colorado in reversing the judgment made the following pertinent observation:

> "The jury returned a verdict for $5,000 in favor of plaintiffs. It might just as well have been $250,000. There is no evidence at all upon which the verdict can rest. It is purely speculative. The estimate of plaintiffs' witnesses as to quantity and value, as well as the verdict of the jury is conjectural—the result of guesswork. A judgment based on such a foundation cannot stand."
>
> Smuggler-Union Mining Co. v. Kent, 122 Pac. 223-228.

When in this case the jury awarded Batt Tamietti and Pete Gaido $770.66 each (Tr. 41-42) and judgment was rendered thereon in their favor, it is quite manifest that the verdict was conjectural and the result of mere guesswork, without any vidence whatsoever to support it.

The laws of Montana wisely provide:

> "8668. Damages must be certain. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."
>
> Sec. 8668, Revised Codes of Montana, 1921.
> See also Central Coal & Coke v. Harrman, 111 Federal Reporter, 96-103;
> Rass v. Sharp, 46 Mont., 474-477;
> Wigmore on Evidence, Sec. 447;
> California Press Mfg. Co. v. Stafford, 221 Pac. 345-347 (Cal.);

McCornick, et al. v. United States Mining Co., 185 Federal Reporter, 748.

The defendants in error have had their day in court, and we must assume that they made out as good a case as it was possible for them to make. It appears from the record that there was a former trial of this case, hence the defendants in error have twice had their day in court, and under the circumstances we respectfully submit that the judgment of the learned trial court should be reversed, with instructions to dismiss.

Respectfully submitted,

WALKER & WALKER and C. S. WAGNER,

409 Silver Bow Block, Butte, Montana.

Attorneys for Plaintiffs in Error,

No. 4486

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

CRYSTAL COPPER COMPANY, a Corporation,
Plaintiff in Error,

vs.

PETE GAIDO and BATT TAMIETTI,
Defendants in Error.

Brief of Defendants in Error

H. A. TYVAND and F. E. McCRACKEN,
507 Silver Bow Blk., Butte, Montana.
Attorneys for Defendants in Error.

BESSETTE-STORK CO., PRINTERS

No. 4486

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

CRYSTAL COPPER COMPANY, a Corporation,
Plaintiff in Error,

vs.

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Defendants in Error.

Brief of Defendants in Error

ARGUMENT

There is no conflict of evidence in this case on the material issues, and the evidence is in support of the allegations of the amended complaint. The facts in this case are quite fully set forth in the Briefs of both, the Plaintiff in Error and the Cross-Plaintiffs in Error, and we, therefore, shall not make any supplemental statement of facts herein.

For the sake of brevity, we will herein call the Plaintiff in Error, the corporation or company, and the Defendants in Error, the co-partners or partnership.

MINING PARTNERSHIP.

The corporation is attempting to raise a question of reversable error on the co-partners in this case, that they are not a mining partnership, because it claims they are not the owners of a mining claim or of an interest therein. The opinion said corporation relies mostly upon to sustain its contention, is, Michalek, vs. New Almaden Co., written by Mr. Justice Haven of the District Court of Appeal, First District, Division 2, California, reported in 184 Pac. 56. A study of that opinion, as well as the other authorities quoted from and cited by the corporation, sustain our position and contention in the case at bar, that the co-partners herein were and are a mining partnership, particularly wherein that opinion says, *"the ownership of an interest in a mine or the right to the possession thereof,————is a prerequisite for the existance of such a partnership."*

It appears from said opinion, that the miners in that case, after cleaning out and re-timbering an old tunnel, went to work on ore already discovered and were to receive a certain pay or wage per ton for the ore they extracted, which is the same system of measurement of wages as is often used in coal mines, where the miners are put to work on coal veins already discovered, exposed and worked by the mine owner himself. The miners in the case of Michalek, vs. New Almaden Co., supra, were not bound to work any specified time or amount of territory, but could stop whenever they wanted to, and there was no agreement that the miners were to acquire any interest in the mine, nor the ore when it was taken out; but they were to deliver

it to the defendant and to receive compensation for their work at the rate above specified." ($6.00 per ton).

In the instant case it is alleged that the said co-partners had an oral sub-lease of a certain portion of the Goldsmith Mine, (Tr. 5) with the exclusive possession thereof in said co-partners, (Tr. 5) for certain royalties if ore was discovered and extracted, (Tr. 6) and the uncontradicted evidence supports all of those allegations of the amended complaint. (Tr. 54-88, 111 and 126). The co-partners, according to the said facts, had the exclusive possession of the leased ground from the 26th day of June, 1921, to the 16th day of January, 1922, and during that time they discovered ore, and they shipped 10 railroad carloads of ore from their development work in the leased ground and received the written returns from the smelter on 8 carloads. On the back of those 8 smelter returns and the other 2 also, Mr. Alderson, General Manager of said corporation, designated the co-partners' part thereof, as "Leasers One-half" (Tr. 65, 68, 71, 74, 78, 81, 82, 84, 87, and 150). In the handwriting of the manager, said co-partners were called leasers at various times covering a period of about six months, and said corporation received thousands of dollars as royalty or rent from said smelter returns of ore shipped, and it acknowledged the receipt of these royalties or rents in the handwriting of its Manager, Matt. W. Alderson. (Tr. 74, 135-136).

The allegations of the amended complaint and the uncontradicted evidence in support thereof show, that the said co-partners did not start to work in pay ore, but on the contrary show that they started to prospect the leased

ground for ore and were fortunate enough to find valuable ore after a month's work by four men. If the aforesaid facts do not satisfy the following Section of the Revised Codes of Montana of 1921, word for word the same as Section 2511 Calif. Civ. Code, then no facts will satisfy said Section to form a mining partnership, to-wit:

> "A mining partnership exisits when two or more persons own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom, actually engage in working the same." Rev. Codes of Mont., 1921, Sec. 8050.

The other authorities cited and quoted from by the said corporation, is 17 Calif. Jur., under the head of "Mines and Minerals", Secs. 106 and 107; and said Sec. 106 is in part as follows:-

> ", nor is it necessary that the property be owned in fee by the partners, *if they have an interest therein, or a right to possession of the property* or to acquire its ownership."

The uncontradicted facts mentioned above, show that the co-partners had the possession and were entitled to the possession of said portion of the Goldsmith Mine at the time three of them were ejected by the said corporation, to-wit, Janauary, 16th, 1922, from said leased portion of said Mine. *Besides the said co-partners having the possession of said portion of said Mine, they had an interest in that portion of the Mine, to-wit, a sub-lease, or in other, words, a leasehold, or what is termed an estate for years.*

The Supreme Court of the United States in a very recent opinion, held that a mining lease does not convey the title

to the unextracted ore deposits, but creates a very substantial interest in a mine or mining claim, and that opinion is in part as follows:-

> "It is, of course, true that the leases here under review did not convey the title to the unextracted ore deposits (Cases cited) ; but it is equally true that such leases, conferring upon the lessee the exclusive possession of the deposits and the valuable right of removing and reducing the ore to ownership, created a very real and substantial interest therein. (Cases cited). And there can be no doubt that such an interest is property." (Cases cited).
>
> Margaret C. Lynch, Executrix etc, v. Alworth-Stephens Co., United States Supreme Court Advance Opinions, 69 L. Ed. 295, 297 No. March 16, 1925.

If the construction, by the corporation, of the said section 8050 Rev. Codes of Mont. 1921, is the law, then in order to have a mining partnership, persons would have to have a written contract for some kind of a present or future legal title in a mining claim, or be the owners in fee thereof; in other words, the Statutes of Fraud would apply to the formation and existance of a mining partnership, which this Court has held is not a requirement of a mining partnership, in the case of Whistler vs. MacDonald, 167 Fed. 477; 93 C. C. A. 113.

Suppose the mine or mining claim leased was an unpatented mining claim, where the lessor has only a possessory right and the Government has the legal title, couldn't such a mine or mining claim be the basis of a mining part-

nership, or can mining partnerships be formed only on patented mining claims? The legal title of the corpus of the ore in place is not transferred and need not be transferred by the parties in order to form the basis of a mining partnership, according to said statute on mining partnerships.

THE DECISION OF A MAJORITY OF MINING CO-PARTNERS GOVERN.

The counsel for said corporation contend that a majority of a mining partnership controls or governs the partnership under Section 8059 of the Revised Codes of Montana, 1921, which is as follows:-

> "The decision of the members owning a majority of the shares or interest in a mining partnership binds it in the conduct of its business."

We are glad that the counsel for the corporation mentioned this provision of the Montana Codes, and we agree with them on this question as an abstract proposition of law. The facts in the instant case show that three of the five co-partners were ejected from and kept off the leased property. They were the three who decided to institute this action, and the actions and decisions of the minority, or individual partners, to the contrary not with-standing. There being a co-partnership, the action should therefore be prosecuted by the co-partnership in the names of all the co-partners, and the verdict should have been in the names of all the co-partners, particularly when the evidence shows that there has not been an accounting and dissolution.

Stuart vs. Adams, 89 Calif. 367; 26 Pac. 970.

Barker vs. Abbot et al, (Tex) 21 S. W. 72.

30 Cye. 565.

The purported release by Lawrence Monzetti, as an individual, is discussed in our brief in the instant case under the Cross-writ of Error, reference to which is hereby made. If the corporation may introduce a purported release of an individual in evidence in an action by a partnership, without pleading such a release and over the objections of the co-partnership, which purported release of an individual apparently was obtained without consideration, through trickery, fraud and deception, then the rules of pleading and evidence are set at naught, substantive law over ridden, and a court action becomes a mockery.

LEASE OR LICENSE: STATUTE OF FRAUDS.

Counsel for said corporation contend that there was a lack of mutuality in the sub-lease between said corporation and the co-partnership. The facts in the instant case show that the co-partners agreed to do certain amount of work in certain ground of the Goldsmith Mine in searching for ore, and in case marketable ore was discovered and mined, then both the co-partners and the corporation were to divide the returns from the smelter, with the corporation, the lessor, getting the long end of the deal. (Tr. 54, 55 and 56). If the co-partners had not done the work they had agreed to do in searching for ore, they certainly could have been sued for damages by the corporation for not performing their part of the lease. On the other hand, if the corporation would not carry out its terms of the lease, and if it ejected or interferred with the co-partners in the prosecution of their work under said lease, then of course the corporation could be sued for damages, and

it is sued herein for its violations of said lease.

The amended complaint and the proof in support thereof show, that on the 26th day of June, 1921, the co-partners forthwith commenced to work under the said lease and diligently prosecuted their part under the lease, personally and by hired help. (Tr. 17, 18 and 57-87). If the foregoing facts do not show mutuality, then there is not and can not be mutuality in any lease.

The corporation also claims, no time was specified for the performance of the terms of the lease. The evidence shows that the co-partners went to work under said lease immediately and continued to work thereunder for about seven months. There is of course implied covenants in leases, and one of the implied covenants in a mining lease is to keep at work.

> Morrison's Mining Rights, page 364, (Covenants to work).

The evidence further shows that by six miners working, the same as the co-partners had done for six months, could have fully performed the terms of said lease in not more than three months from the 16th day of January, 1922. The statutes of Montana provide, that if the period of time is not specified in a lease, it is presumed to be for one year.

> Sec. 7743, Rev. Codes Mont., 1921.
>
> Giovanetti vs. Schab, 41 Mont. 297, 302; 109 Pac. 141.

The counsel for the corporation claim that the co-partners did not have exclusive possession of the sub-leased portion of the Goldsmith Mine. There is no evidence to

show that they did not have exclusive possession thereof, and the following evidence shows, without contradiction, that they had such possession of said sub-leased portion of the mine, to-wit:-

Pete Gadio testified as follows:-

> "After we sank the winze and got through with it us five partners were working together and nobody else, but after that there was a boy working for us, John Ardenson was working there for us five partners, and we paid him five dollars and twenty-five cents a day."
>
> "In my opinion it would take about thirty days to have stoped out the ore left in the hanging-wall lead at the time we were ejected from the lease on January 16, 1922, with six of us working there. In the footwall lead it might give us more trouble, but in my opinion it would take about forty days to have stoped out the ore there, or forty-five days, six men working. There was nobody else working in the drift and in the cross-cut and in the winze besides us five partners and Mr. Ardenson when we were working there. We were the only ones working there, the only ones taking out ore."
>
> (Tr. 126-127).

Mr. Monzetti testified as follows:-

> "We worked a little over two months I guess in the winze and drift under the 500-foot level, under the lease in this case, before we shipped any ore. We were doing dead work. Nobody else worked in that winze and drift in the place we were working, be-

sides our five partners in the time between the 26th day of June, 1921, and the 16th day of January, 1922, except the man we hired there. Nobody else besides my partners took out any ore in that particular place, that is in the drift and the hanging-wall vein and in the footwall vein. We shipped the first carload of ore around in August some time."

(Tr. 111).

"Three of us were working on each shift. We had another man working besides the five partners, a man by the name of John Ardeson; and paid him wages. The partners paid him, the five of us. We started to work two shifts around the middle of August, and paid Mr. Ardenson about five dollars and a quarter. The average wage scale in this camp at that time was four dollars seventy-five cents a day. I did not receive any wages when I worked up there."

(Tr. 110).

These uncontradicted facts, in our opinion, conclusively show that the co-partners were in exclusive possession of the place they had under sub-lease and were working. Besides this evidence there is a great deal of evidence on this point that the said co-partners had exclusive possession of the sub-leased ground. If they had not been in exclusive possession of said place, the defendant would certainly have produced such evidence.

The counsel for the corporation contend that the co-partners had no oral lease, but merely held a license revocable at pleasure,- particularly a pleasure to the corporation managment and revocable when the development work

had been done by the co-partners and there were high ore values in a three to four feet vein, discovered and exposed by the co-partners, in the drift and stopes of the leased ground. Under the title of lease or license, the counsel for the corporation labor through about three-fifths of the space of their argument in their brief, by citing and quoting from text books and opinions on varying facts in different cases in different juisdictions, on what has been held to be a license and not a lease, and contend that there can't be a parole mining lease.

We do not contend that there is not such a thing as a license to mine, or working contract to mine. To the contrary we concede that there is such a thing as a license to mine, a labor contract to mine, and a lease to mine. We concede that there can be a written license to mine, a written labor contract to mine, and a written mining lease. We further concede that there can be an oral license to mine, an oral labor contract to mine, and an oral mining lease. The cases cited and quoted from by the counsel for the corporation in their brief, are cases on licenses and labor contracts. None of them hold that there is not or can not be a written or parole mining lease. After going into the question of a mining lease, with a Montana case on the question of a mining lease directly in point, we desire to call the courts attention to the case cited and quoted from, by the counsel for the corporation in their brief, and show wherein they are distinguishable from the case at bar.

The Supreme Court of the State of Montana, in the case of Pelton vs. Minah Consolidated Mining Co., 11 Mont. 281; 28 Pac. 310, as far as Montana is concerned, has

held that there is such a thing as a mining lease, and shows what terms and conditions make a mining lease. If certain terms and conditions make a mining lease and there is such a thing as a mining lease, then of course the general Statutes of Montana on leases apply to mining leases.

17 Cal. Jur., page 425, sec. 97.

In the Pelton case, supra, the Minah Consolidated Mining Co. owned a mining claim. One, Mr. Swan, obtained a lease thereon and worked the same. In working the said claim, Mr. Swan employed a man by the name of Mr. Pelton, the plaintiff in said case. Mr. Pelton was not paid in full by Mr. Swan and therefore attempted to place a mechanic's lien against said mining claim and attempted to foreclose it against the said company. The Supreme Court of the State of Montana in that case held,———— "the" (Legislative) "act above cited whereby it was provided, in effect, that the interests of proprietors in leased premises could not be charged with a lien for labor performed thereon for the use and benefits of tenants or lessees. Therefore, said Swan being lessee of said premises, we must hold, under the provisions of said statute, that the interests of the appellant" (mining company) "therein are not subject to the lien sought to be enforced against it in this action."

The terms of the lease of Mr. Swan, were substanially the same as those of the co-partners in the case at bar. The only differences between that and the case at bar, are, that the period of time in the Pelton case was fixed by time, one year, and in the instant case was fixed by the amount of territory to be worked; and that the lease in the Pelton case

was in writing, and the one in the instant case is verbal.

It is elementary that parole leases are just as legal and valid as written leases in the State of Montana, where they do not conflict with the Statutes of Frauds, and if they are in conflict with the Statutes of Frauds and the tenant is in possession, the tenancy becomes a tenancy at will, according to the case of Centennial Brewery Co. vs. Rouleau, 49 Mont. 490, 143 Pac. 969, and it is in part as follows:-

> "Other consideration aside, upon the assumption that the oral lease was wholly void, we think that in correct theory the defendants became Lavell's tenants at will. (numerous cases cited) Upon the theory, the tenancy would have been terminated by the giving of the notice prescribed in section 4502, supra; otherwise by express provision of section 4503 the action could not be maintained. As Lavell's successors, the plaintiff had no other or greater rights than he had. Rev. Codes Sec. 4521."
>
> "A tenancy or other estate at will, however created, may be terminated by the landlord's giving notice in writing to the tenant in the manner prescribed by the Code of Civil Procedure, to remove from the premises within a period of not less than one month, to be specified in the notice."
>
> Sec. 6744, R. C. Mont. 1921.
>
> Sec. 4502, R. C. Mont. 1907.
>
> "After such notice has been served, and the period specified by such notice has expired, but not before, the landlord may re-enter, or proceed according to law to recover possession."

Sec. 6745, R. C. Mont. 1921.

Sec. 4503, R. C. Mont. 1907.

Referring again to the case of Pelton vs. Minah Con. M. Co., supra, the Supreme Court of Montana, on the question of a mining lease, says and quotes from several authorities as follows:-

> "In regard to what conditions constitute a lease, Mr. Justice Thompson, in delivering the opinion of the court in United States v. Gratiot, 14 Peters, 526, said: 'The legal understanding of a lease for years is a contract for the possession and profits of the land for a determinate period, with the recompense of rent. The contract in question is strictly within this definition. The business of smelting is a part of the operation of mining, although it may be a distinct branch from that of digging the ore; but the law ought not to be so construed as to require the whole operation to be embraced in the same contract. They are different operations, requiring different qualifications and distinct regulations. This contract is for possession land. etc.————
>
> "In Moore v. Miller, 8 Pa. St. 272, Mr. Justice Coulter, in expressing the opinion of the court, says: 'In estimating the language which constitutes a lease, the form of words used is of no consequence. It is not necessary that the term 'lease' should be used. Whatever is equivalent will be equally available. If the words assume the form of a license, covenant, or agreement, and the other requsites of a lease are present, they will be sufficient. (Co. Litt; Bac. Tit

'Lease', K) An agreement that Miller should enter and dig ore, build houses, etc. he to pay, as compensation to the owner of the land, fifty cents a ton of ore, was, in substance and in fact a lease.

"Bouvier defines a 'lease' to be a 'species of contract for the possession and profits of land and tenements, either for life or for a certain period of time, or during the pleasure of the parties' (Bouvier's Law Dict.)"

"A 'lease' is a contract for the possession and profits of lands and tenements on the one side, and the recompense of rent or other income on the other, or it is a conveyance to a person for life, or years, or at will, in consideration of a return of rent or other recompense.' (12Am. & Eng. Encycl. of Law, 976.)"

"The instrument before us contains the elements which constitute a lease, of a character and for purposes common to the mining regions of this State, and it contains no provisions or conditions whereby we can hold it to be a contract of any other nature."

Pelton v. Minah Con. Min. Co., 11 Mont. 281, 283; 28 Pac 310.

Some other authorities in point that a contract containing the same elements as the lease in the case at bar, is a lease, are the following:-

U. S. vs. Gratiot, 14 Peters 525. 539; 10 L. Ed. 573.

Reynolds vs. Hanna, 55 Fed. 783, 800.

Hyatt vs. Bank, 113 U. S. 408, 5 Supt. Rep. 573.

3 Roses Notes, page 579.

Lindley on Mines, 3rd Add., Vol. III, page 2138.

Morrison's Mining Rights, 15 Add., page 357.
17 Cal. Jur., page 424, Sec. 96.
18 R. C. L., page 1186, Sec. 96; 1188, Sec. 97.
Lyuch, Ex. v. Alworth-S. (U. S.), 69 L. Ed., 295.

Some cases holding that an oral mining lease is valid:-

Kjelsberg vs. Chilberg, 177 Fed. 109.
Ruffati vs. Societi etc., 10 Utah 386; 37 Pac. 593
Moore vs. Miller, 8 Pa. St. Rep. 272.

The counsel for the corporation have quoted from and cited many cases on licenses and working contracts, but not any of them have held that there can't be such a thing as an oral mining lease. To the contrary we have cited and quoted from several cases, holding that oral mining leases are valid. Lindley on Mines on the question of licenses and leases says the following:-

"The line of demarcation between a license coupled with an interest and a lease, and between a lease and an absolute grant of the minerals with possessory privileges, is not clearly defined. There is considerable confusion in adjudicated cases, rendering it difficult to draw any accurate or generally accepted conclusion. - - - - - -

"If certain consideration, however, are borne in mind, this confusion is found to be more apparent than real. Where the grantor is the absolute owner of land containing mineral, and so long as both grantor and grantee remain alive and sui juris, questions which come up under instruments conferring mining rights often call for adjudications only to the extent of ascertaining the respective rights of the parties to

the contract. As already pointed out, the practically important question is what are these rights, rather than what is the proper name for the instrument. A given instrument, for instance, may very properly be held a lease as between grantor and grantee; that is to say, such conclusion may be perfectly correct so far as is necessary to determine in the matter before the court;————We must therefore always keep in mind what is the question before the court, and we will find that most of the decisions are from such standpoint harmonious.

Lindley on Mines, 3rd Add., Vol 3, page 2134, Sec. 861.

Morrison's Mining Rights, says the following about leases and licenses, to-wit:-

"The material distinctions between a lease and a license are that:-

1. A license is not exclusive.

2. It invests the licensee with no property in the mineral until it is severed from the ground.

3. It may be revoked at any time.

4. It is not transferable.

"The above stated differences show that a license practically amounts to a mere priviledge to work at the owner's will. It is a permission sufficient to defeat the charge of trespass but is not that property in the soil such as parties contracting on equal terms for permanent working naturally bargain for. On the other hand, it is usually granted without any, or for a nominal consideration.

"It has been held that a lease which did not bind the lessee to work was a mere license.——Wheeler vs. West, 71 Cal. 126, 11 Pac. 871, 78 Cal. 95, 20 Pac. 45; Collins v. Smith, 151 Ala 133, 43 So. 838. But these rulings would be indefensible if the party had gone into possession under the implied covenant to work. In every lease, verbal or written, reserving royalty, there is an implied covenant to work (See p. 364) and the express obligations to work is not one of the distinctions between lease and license. The exclusive rights to mine implies a lease and not a license.——Consolidated Coal Co. v. Peers, 150 Ill. 344, 37 N. E. 937; Stinson v. Hardy, 27 Or. 584, 41 P. 116."

Morrison's Mining Rights, 15th Add., page 374.

As stated above, the cases cited and quoted from by the counsel for the corporation in their brief, are on the question of a license or a contract for labor, and are distinguishable from the instant case. We shall take their cases one by one and show wherein they are distinguishable from the case at bar.

The case of Wheeler vs. West, 71 Calif. 126; 11 Pac. 871 is a case of an oral license to mine. The court in that case says:-

"The verbal contract of February 14, 1883, as found by the court and jury, under which defendants were to enter and work a certain portion of the mine *if they saw fit*, and to exercise their own discreation whether they worked it or not, did not create the re-

lation of landlord and tenant between them and the plaintiffs".

No time for to work, or amount of territory to be worked, was specified. In other words, it was revocable at will, and there was no mutuality in said contract. Both of which matters are ear-marks of a license.

The case of Shaw vs. Caldwell, (Calif.) 115 Pac. 941, is a case of a written license. In that case the plaintiff had executed a bargain and sale deed to a one-half interest in a mine in consideration of one dollar and the doing of necessary assessment work to hold the claim at the grantee's expense,. It also provided that the two grantees might work and develop the mine at their own expense, and that all gold or proceeds taken therefrom for 20 years should be divided equally among the parties; that is, each to have a one-third thereof. It was held that the provisions for working the mine apart from the doing of assessment work was a mere license to be excerised by the grantees, or not, at their election; the word 'may' not being construed to mean 'must'.

The case of Clark vs. Wall, 32 Mont. 219, 222, is another case of an oral license, and clearly so. The court, in part in that case, says:-

> "About this time (April 20, 1904) the plaintiff entered into a verbal agreement with the defendant Wall to the effect that Wall should have permission and privilege of entering the claim by the 'Tripod Shaft', and connected with certain stopes and a drift. Under this agreement, *Wall might enter into said shaft and into said workings, and might mine and*

extract ore from the same, during the will and pleasure and during the consent of this plaintiff, with the express understanding that said privilege, permission, or right to mine in said premises should terminate and cease, whenever or at such time as this plaintiff might desire."

It clearly appears from said quotation from said case that there was no grant of any lease for any certain amount of territory to be worked or for any length of time. It does not contain the elements of a lease, and is only a privlege or permission to the licensee which could be terminated by the licensor at any time. It had the very ear-marks of a license.

In the case of Ivey vs. La France Copper Co. et al, 45 Mont. 71, 74, the plaintiff attempted to set up three causes of action, to-wit:- One for wages for the time he had worked in the Lexington Mine; one for the value of the ore knocked down; and the third for damages for breach of a lease. The court in that case, in part, says:-

"After experiencing some difficulty in establishing a cause of action, other than that relating to forty tons of ore, the plaintiff practically abandoned the cause of action for breach of the so-called lease agreement in itself by testifying that Mr. Frank (manager) reserved the right to terminate the agreement by paying day's wages for the dead work."

It appears from the facts in that case as stated by the court, that the licensor reserved the right to terminate the agreement by paying the wages for the time the licensee had worked-, in other words, there was no grant of any

certain time the licensee could or should work, but the right of working there could be revoked at any time, clearly showing one of the main elements of a license.

The case of Michalek vs. New Almaden Co., supra, is a case of an oral working contract, and clearly so. The following words from said case will demonstrate that, to-wit:-

> "There was no agreement that the miners were to acquire any interest in the mine, nor in the ore when it was taken out; but they were to deliver it to the defendant and to receive compensation for their work at the rate specified. ($6.00 per ton) They were not bound to work any specified length of time, but could, stop whenever they found that they would not get enough compensation out of the ore to satisfy them."

The miners in that case had no grant of any certain territory to be worked, or any length of time to work, or any interest in the ore or the value of the ore, but merely in the number of tons extracted,-the basis on which their wages were determined.

In the case of Hudepohl v. Liberty Hill Consolidated Mining Co., 80 Calif. 553, 22 Pac. 339, the question of a mining lease or license was not the direct issued in the case That was an action to collect on a promissory note, wherein the defense of no consideration was interposed, because the miners' share of the proceeds under a mining contract, for which the note had been executed, had not been ratified by the stockholders of the defendant company, which it was claimed was required under a California Statute,

in order to make a valid mining lease, and the defendant in that case therefore claimed there was no valid consideration for the promissory note. The court in that case set out the mining contract haec verba in its opinion, and a reading of the opinion will demonstrate that the written contract shows that it was for a certain mining claim, for a certain length of time, and for certain rent, which ordinarly satisfies the definition of a lease, but the court in that case, without discussing the elements which constitute a lease, license, or working contract, says:-

> "If the agreement could be construed to be a lease of real estate of the defendant, it may be conceded that the point made against its validity would be well taken; but we do not regard it as a lease. It is true the parties so term it in the instrument itself, but that cannot affect its legal construction. As we construe the agreement, it was one for the working of the mine on the shares, and the parties became tenants in common of the products of the mine when taken out.---Such a contract does not create the relation of landlord and tenant, but fixes a rule of compensation for services rendered. It is, in all essential features, a contract for labor to be performed and to be paid for by a share of the profits realized from such labor."

The court in that case held, that the mining contract was not a mining lease but a contract for labor, and that the parties thereto were tenants in common, without giving any real legal reason therefor. "Tenants in common are generally defined to be such as hold the same land together by several and distinct titles, but unity of possess-

ion, because none knows his own severalty, and therefore they all occupy promiscuously." 2 Bl. Comm. 60. What title did the miners in that case have to the mining claim under the contract, if it was a contract for labor? If it was a contract for labor, the miners were employees of the company. The only interest or title in the mining claim the miners in that case could have, would be a lease, but the court held it was a labor contract. It appears to be a rather peculiar construction, particularly when the court says: "the parties became tenants in common of the products of the mine when taken out." If the parties became tenants in common of the products, which is personal property, then we have tenants of personal property, another peculiar situation. In other words, we have the relation of landlord and tenant without land being involved in any way.

It appears the real reason for the decision in that case is given in the concurring opinion by Mr. Justice Paterson, which is as follows:-

> "I concur. With the money in its treasury for which this note was given, it would be grossly inequitable to allow the corporation, after full performance, practically to retain the money which should have been turned over to H. & B. in specie as their share of the proceeds. I think the corporation is estopped by its acts. Argenti v. San Francisco, 16 Cal. 266."

The corporation contends that the Statute of Frauds on sale of real estate, authority of an agent to sell real estate, and lease of real estate for more than one year, apply

to the case at bar. Where is there a sale of real estate in the instant case? If the leasing of mining ground is the sale of ore in place, or part of the real property, then there never could be a mining lease but it would be a deed, and every so-called lessee of a mining claim, in the past, present or future would be the owner of the legal title, or fee, in the ore in the ground which has been, is, or will be leased, (or rather sold and deeded). Such lessees would be the owners in fee, or hold the title, of the ore in place until they sold it by giving a so-called lease, or deed, or it would pass to their heirs or devisees upon their deaths. We have not found any cases supporting the contention of the corporation to that affect. It therefore appears that the leasing of a mine or a mining claim is not a sale of real estate. But, we have found several cases and authorities holding that a mining lease is like any other lease,-i. e., it is a grant of the possession and the use of real property to a lessee for a certain time for rent or royalties.

On the question of a lease for more than one year, we have the uncontradicted evidence in this case, showing that the leased ground would have been completely worked in about ten months from the 26th day of June, 1921, the date of the original sub-lease, if the corporation had not ejected the co-partners from the leased property. It, therefore, clearly appears that the Statute of Frauds on leases for more than one year does not apply.

The evidence in the handwriting of the manager of the corporation, showing the receipt of the royalties from ten seperate carloads of ore, mined, shipped and smelted, confirms the statement of the terms of the lease as given by

the co-partners, and ratifies said lease by said corporation by its acts in writing, covering a period of about seven months. This, as well as the issuance of the certificates of shares of the corporation stock to the co-partners, signed by the corporation, ratifies the acts of its manager, as well as its own acts, in letting this lease to the co-partners which had not expired when three of them were ejected from the leased ground. The corporation in its brief laments the fact that it could not have Mr. Alderson, its manager at one time, to combat our contentions herein. None are more sorry than we are. We wish that he had been at the second trial of this case. Our expierence with him at the first trial would have made him a very valuable witness for the co-partners at the second trial.

Even though if the lease had been under the Statute of Frauds, there is the part performance thereof, which would have been taken it from under the said statute. The evidence is that the co-partners went to work in barren rock, searching for ore. Four of the co-partners worked steadily for at least one month before commercial ore was discovered. When the ore was encountered, then the fifth partner, Frank Tamietti, "the sick man," became well and started to work. The five partners and one employee, Mr. Ardenson, making three on a shift, worked steadily until the 16th day of January, 1922, when Batt Tamietti, Pete Gaido and Lawrence Monzetti were ousted and kept from going on with said sub-lease. In that period of time ten railroad carloads of ore had been shipped from the leased ground by the co-partners while doing development work mostly, and practically no stopping, except for

an area of about twenty feet long by twenty feet high in the hanging-wall lead or vein. The winze had been sunk as well as the sump, the drift of about one hundred feet on the vein of ore had been dug and timbered, and ore chutes and slides had been constructed to catch and carry the ore when it would be stoped down from said vein and carried into ore cars. A cross-cut into the foot-wall had been dug and timbered, and considerable other work had been done by the co-partners preliminary to the stoping of the ore in said veins. In other words, they had done the hard work and were ready to reap the benefit of their labor when the corporation ousted them and stole thousands of dollars worth of ore from the co-partners, Batt Tamietti, Pete Gaido, Lawrence Monzetti. On the other hand, Frank Tamietti, "the sick man," for some reason or other, became a beneficiary of the said acts of the corporation, to what extent, we do not know, and in all probability will never know; but in his eagerness to testify in this case, he said, "They" (Pete Gaido, Batt Tamietti and Lawrence Monzetti) "came to me and wanted me to sign with them, and fight the case, but I said I would have nothing to do with it. I said the Crystal Copper Company, the manager, treated me good, and I got nothing to say against it. I said 'If you want to fight it go ahead and do it yourself', We (Frank Tamietti and others who received the benefit of the ejected co-partners' work) got fifty feet more than we asked for. I received all the stock and settled for all the stock I agreed to take." (Tr. 172).

On the question of part performance of a contract, tak-

ing it from under the Statute of Frauds, we have the following cases in point:-

"At the time defendant took possession of the preises the unexpired term of the lease exceeded one year, and therefore there cannot be any doubt that the statute of frauds applied in the first instance (Fliner v. McVay, 37 Mont. 306; 15 Ann. Cas. 1175), but the decided weight of modern authority and the better reasoning support the view that partial performance under the assignment invalid because not in writing, may render the tenant liable according to the terms of the lease. (Edwards v. Spalding, 20 Mont. 54; 49 Pac. 443; 16 R. C.L. 853 etc.) If, then, partial performance will take the case out of the statutes, a fortiori will complete performance do so.

"The statute of frauds was never intended to cloak fraud, but to prevent it. Its aim was to avoid the assertion of claims which from the very nature should be evidence only by an instrument in writing signed by the party to be charged or his agent thereunto duly authorized. But when a tenant has occupied the demised premises voluntarily for the full term of the lease, he may not invoke the invalidity of the contract to shield him from payment of rent."

Wells v. Wadell, 59 Mont. 436, 442.

ASSIGNMENT NO. 2.

Under assignment No. 2, the corporation contends, that both a license and a contract for labor are the conditions which apply to its position in this case. This seems a rather peculiar situation that the co-partners are both lic-

ensees and working under a contract for labor. The cases they have cited and quoted from, have held that the miners were either licensees or working under a contract for labor, -not that they were both licensees and employees.

In support of its contention that the relation of master and servant existed in this case, it quoted on page 86 of its brief from the smelter returns, where deductions were made from the "leasers one-half", or in other words, the co-partners' share, for the Industrial Accident Board Fund, under the Workmens' Compensation Law. This evidence shows that the co-partners were leasers from the corporation and not employees of the corporation. If the contention of the corporation that the co-partners, or "leasers," were employees of the corporation, then the corporation was guilty of the crime of a misdemeanor, at least sixty times, under the said facts and the following section of the Revised Codes of Montana, 1921, to-wit:

> "It shall be unlawful for the employer to deduct or obtain any part of any premium required to be paid by this act from the wages or earnings of his workmen, or any of them, and the making or attempt to make any such deduction shall be a misdemeanor, except that nothing in this section shall be construed as prohibiting contributions by employees to a hospital fund, as elsewhere in this act provided."
>
> Sec. 2937 Rev. Codes of Mont. 1921.

By its contention, it appears to us, the corporation is taking in too much territory,-not even territory leased to others.

ASSIGNMENT 3-4-6-7.

ON THE RIGHT TO RECOVER MORE THAN NOMINAL DAMAGES.

The way the corporation threats this title, it does not seem to consider it material to the case,-or at least secondary in importance.

There were estimates made, that there were about 1000 tons of ore left in the hanging-wall vein, of about the same value as the ore already shipped to the smelter in ten carloads, and the returns thereof received and in the evidence in this case; (Tr. 94-98, and 124) about the same amount of ore was estimated, to be left in the foot-wall vein, of about one-half of the value in the hanging-wall vein, at the time the co-partners were ejected. We proved that the wage scale in Butte, Montana, for the miners, at that time was $4.75 per day. (Tr. 110) We introduced the smelter returns, or at least part of them, of the ore taken out of the leased ground after the co-partners had been ejected, showing that three, and probable six, carloads of ore had been shipped from the leased ground, giving the amount of tonnage, value of the ore therein, time for extracting it, costs of loading, costs of transportation to the smelter, costs of treatment of the ore at the smelter, the royalties to the owners of the Goldsmith Mine, royalties to the corporation and the balance to the miners. These facts certainly were facts sufficient to prove the damages to the co-partners in this case. By proving this, we went farther than was legally required of us, in view of the facts that it was proven that the corporation had had the leased ground entirely worked. (Tr. 169) This being the situation, it was incumbent upon the defendant to prove

what was the amount and value of the ores extracted, according to the case of Isabella Gold M. Co. vs. Glenn, and is in part as follows:-

> "But if the evidence were more indefinite than it is, we would not disturb the verdict because, in the circumstances, the eviction being proved and the extraction of large bodies of ores by the defendant and its other tenants being shown, the burden was upon defendant to prove the amount and value of the ores which it and its lessees removed during the term of plaintiff's lease, and it entirely failed to discharge that duty."
>
> Isabella Gold M. Co. v. Glenn, 37 Colo. 156; 86 Pac. 349.

We respectfully submit that there is a valid mining partnership and a valid mining sub-lease in this case, and the co-partners have been damaged by the actions of the corporation in ejecting them from the leased property, and errors were committed by the trial court at the trial as contended by the co-partners in their brief under the Cross-writ of Error in this case, and therefore, this case should be reversed and remanded for a new trial.

Respectfully submitted,

H. A. Tyvand and F. E. McCracken,
507 Silver Bow Blk., Butte, Montana
Attorneys for Defendants in Error.

No. 4486

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT 16

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLERRO, and FRANK TAMIETTI,

Cross-Plaintiffs in Error.

vs.

CRYSTAL COPPER COMPANY, a Corporation,

Cross-Defendant in Error.

CROSS-PLAINTIFFS IN ERROR'S BRIEF

H. A. TYVAND and F. E. McCRACKEN,
Attorneys for Cross-Plaintiffs in Error.
507 Silver Bow Block, Butte, Mont.

BESSETTE-STORK CO., PRINTERS, BUTTE

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CROSS-PLAINTIFFS IN ERROR'S BRIEF

UPON CROSS-WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF MONTANA

STATEMENT OF THE CASE

This is a case by a mining partnership, consisting of five members, to-wit: Lawrence Monzetti, Pete Gaido, Batt, Tamietti, John Pagleero, and Frank Tamietti, a-ginst the Crystal Copper Company, a corporation, to re-

cover damages under two causes of action. The first cause of action is brought to recover damages under an oral mining lease against said corporation for ejecting and keeping three of said co-partners from going on with their work under said sub-lease. (Tr. 2-13) The second cause of action is brought to recover damages for the conversion by said corporation of corporation shares of stock belonging to plaintiffs in the said corporation. (Tr. 13-26)

On the first cause of action there was a verdict for two of the co-partners, to-wit, Batt Tamietti and Pete Gaido in the sum of $770.66 each. (Tr. 40). As to the other three co-partners, there was no verdict of any kind. Judgment was entered on the said verdict. (Tr. 41).

On the second cause of action, a motion for an instructed verdict in favor of said corporation was granted. (Tr. 181-185).

The said corporation has brought this case into this Court on a Writ of Error.

The said Batt Tamietti and Pete Gaido filed a petition for a Cross-Writ of Error, and such a Cross-Writ was issued. In support of said Cross-Writ, this Brief is filed. At the time said Cross-Wit of Error was issued, an order was made that the Transcript filed by the said coroporation in connection with its Writ of Error, is to be used for the consideration of said Cross-Writ of Error. A reference to a transcript in this Brief, is a reference to said transcript of record.

The amended complaint as to the first cause of action shows, that on June 26th, 1921, the said copartners sec-

ured an oral mining sub-lease from the said coroporation on a certain portion, below the 500-foot level of the Goldsmith Mine near Butte, Montana. The Goldsmith mine extends in an easterly and westerly direction 1500 feet, and 600 feet in width. There had been a winze formerly sunk from the said 500-foot level, on an incline of about 35 degrees in a southerly direction in the North lead of said mine to a depth of about 30 feet, about 1000 feet northwesterly from the main shaft of said Mine. Said North Lead is extending in an easterly and westerly direction. The said co-partners secured an oral lease from the said corporation on the following terms:- They were to sink the said winze to the depth of 50 feet below the 500-foot level, and any vein of commercial ore they would discover, if any, in that distance, they were to have the exclusive right to follow to the boundries of said mine, if it extended that far, and up to the 500-foot level, if it extended that far up, and to have the exclusive right to mine and extract the commercial ore there-from on paying certain royalties; the said corporation was to furnish the tools, explosives and timber, and was to hoist all the ore and waste the said lessers would bring to said main shaft of said mine, and it was to furnish the power to run the mining drills and the pumps to pump the water from the place where the said leasers were working, and was to hoist and lower the said leasers and their employees from and to the said 500-foot level when going to and from work and when otherwise necessary; from the ores shipped by the said lessees under the said sub-lease, the following deductions were

to be made, to-wit:

> "Freight charges on all the ores shipped to the smelter, and on all ores assaying up to $25.00 per ton, 11 1-2 per cent royalty; from $25.00 to $50.00 per ton 23 per cent royalty; from $50.00 to $100.00 per ton, 34 1-2 per cent royalty; from $100.00 to $200.00 per ton 46 per cent royalty; from $200.00 and up per ton 57 1-2 per cent royalty to the owner of the Goldsmith Mine, and 50 per cent of the net balance was to go to the plaintiffs and 50 per cent to the defendant." (Tr. 6).

Four of the said co-partners started to work under said lease in the evening of June 26th, 1921, and continued to work daily until the 20th day of July, 1921, when they struck ore of commercial value at the depth of about 48 feet below the 500-foot level. The fifth partner, Frank Tamietti, who had claimed to have been sick, became well and started to work also. At this time the said Co-partnership and the said corporation agreed on an extension of territory in depth to be developed by the co-partners, on the same terms and conditions as the original sub-lease. They then followed the vein of commercial ore to the depth of about 75 feet, when they struck a fault, cutting off the vein on the west. They then ceased sinking the winze except for sinking a sump to hold the water between shifts and so the water could accumulate, so that the pumps would not have to be operating all the time. They then drifted easterly on the said vein of commercial ore which was on the average, between three and four feet wide, and pitching at an angle of about 45 degrees north. They

drifted along said vein for a distance of about one hundred feet. At about 100 feet from the said winze, the said vein was broken up and ceased to be of commercial value. As they cut the drift along on said vein, they timbered it and put in ore chutes and slides to catch and carry the ore there-after stoped, down from said vein, into ore cars or other recepticals at the said ore chutes. In sinking the winze in commercial ore, and cutting the said drift in commercial ore, shipments thereof were made showing values of about $81.00 per ton, in gold and silver. They then stoped down from the vein of commercial ore near the winze, an area of about 20 feet high by 20 feet long, which ore was shipped and showed the same value as aforesaid.

The said leasers were granted additional territory to what they had exposed of commercial value. The additional territory granted was to be on the same terms and conditions as the original sub-lease. This additional territory granted, was, they were to cross-cut northerly into the foot wall of the said North Lead, to look for a foot wall lead, and they were to have all the commercial ore up to the 500-foot level and to the boundries of said mine, if any commercial ore was discovered and continued within said area. They cut a cross-cut of about 15 feet when they struck what was called the foot-wall lead, on the average of about 3 feet wide and assaying $44.00 per ton in silver and gold. It was estimated that there was left in the hanging wall lead, up to the 500-foot level about 1000 tons of the value of about $81.00 per ton, which could have been mined in about 30 days, at a net

profit to said leasers of $16.67 per ton; that there was about 1000 tons in the foot wall lead left up to the 500 foot level, which could have been mined by the said leasers in 90 days, at a net profit to said leasers of $12.50 per ton.

At about this time, being about January 16th, 1922, three of said co-partners were prevented and kept from going into said mine to continue with their said sub-lease by the said corporation, and the said corporation thus violated the terms of the said lease without cause to the damage of said leasers in the sum of $22,166.67.

The second cause of action contains most of the allegations of the first cause of action, and in addition thereto, it is alleged as follows:

> That on or about the 19th day of October, 1921, while the said plaintiffs were working in and upon the said lease, the said plaintiffs entered into contract with the defendant, at the said defendant's special instance and request, to purchase 5,000 shares of stock in the defendant corporation from the said defendant at the agreed price of 25c per share net, and that the said stock was to be paid for by said plaintiffs as follows, to-wit: $25.00 was to be taken from the net returns of each of said plaintiffs share on each and every railroad car, of about 50 tons each shipped by the said plaintiffs from said lease and sold to the smelter on and after said date.
>
> That thereafter the said plaintiffs shipped a railroad car of about 50 tons on the 27th day of October, 1921, and $25.00 from each of said lessees was

deducted from their share in the returns of each railroad car of ore so shipped, and the said money deducted was credited upon the said 5,000 shares of stock, and that $25.00 from each of said plaintiffs was deducted from each and every railroad car thereafter shipped by said plaintiffs and sold to the smelter.

That on or about the 3rd day of January, 1922, the said plaintiffs had paid for 2,500 shares of stock by the deductions made on each railroad car so shipped as aforesaid, and that the said defendant delivered 500 shares of stock to each of the said plaintiffs or 2,500 shares of stock, and thereby ratified said agreeement to sell stock to said plaintiffs as aforesaid.

That thereafter on or about the 31st day of January, 1922, the sixth railroad car of ore of about 50 tons, after entering into said contract to purchaser stock was loaded by the said plaintiffs and shipped to the smelter and sold, and that $25.00 was deducted from the net returns of each of said plaintiffs to pay on said contract for said stock.

That thereafter on or about the 3d day of March, 1922, the said plaintiffs shipped the seventh railroad carload of ore, after entering into said contract to purchase stock, from said lease of about 25 tons to the smelter and sold the said ore, and that the sum of $25.00 was taken from the net returns of each of said plaintiffs on said railroad car to pay on said contract for said stock.

That the plaintiffs, Lawrence Monzetti, Pete Gaido, Batt Tamietti and John Pagleero worked

continuously under the said sub-lease and the said extension thereto from the 26th day of June, 1921, until the 16th day of January, 1922, and that plaintiff, Frank Tamietti worked continuously under the said sub-lease and the said extensions thereto from on or about the 20th day of July, 1921, until the 16th day of January, 1922; that the defendant then and there on or about the 16th day of January, 1922, arbitrarily ejected plaintiffs, Lawrence Monzetti, Pete Gaido and Batt Tamietti without cause, from said property, and arbitrarily refused to permit the said plaintiffs to go on with the said sublease, without cause, and arbitrarly refused to permit the said plaintiffs, Lawrence Monzetti, Pete Gaido and Batt Tamietti, to enter into said mine or upon said property for the purpose of breaking ore and hoisting ore to finish their contract of paying for the stock the plaintiffs had purchased, without cause, or to enter in or upon the said property, and arbitrarily cancelled and rescinded the said sublease, without cause, and that defendant arbitrarily refused to deliver 400 shares of stock heretofore paid defendant by plaintiffs by deductions of $25.00 from each of said plaintiffs share from each of the said last 2 railroad cars of ore shipped, without cause; and that defendant ever since the said last 2 railroad cars of ore have been shipped as aforesaid, have arbitrarily refused to deliver the said 400 shares of stock to plaintiffs heretofore paid for by plaintiffs as a foresaid, without cause.

That there were about 1,000 tons of ore averaging 70 ounces of silver per ton and $11.00 per ton in gold or of the value of $81.00 per ton in the vein of ore on the hanging-wall side of said lead, between the bottom of said winze and the 500-foot level of said mine, and the east and west line of said mine yet to be mined on said date that could and would have been mined by said plaintiffs within 30 days from and after the said 16th day of January, 1922, if, the said defendant had not interfered with the said plaintiffs and arbitrarily cancelled and rescinded the said sub-lease, without cause, that the said plaintiffs were and are entitled to under said sub-lease, to mine and ship to the smelter under the terms, conditions and royalties of the aforesaid sub-lease, and that these plaintiffs would have realized on said ore a net profit to themselves of Sixteen and 67|100 ($16.67) Dollars per ton; and that there were approximately One Thousand (1,000) tons of ore to be mined in the footwall of said lead between the bottom of said winze and the 500-foot level of said mine and the east and west lines of said mine which could and would have been mined by said plaintiffs within a period of ninety days from and after the 16th day of January, 1922, if the said defendant had not interfered with said plaintiffs and arbitrarily cancelled and rescinded the said sub-lease, without cause, as aforesaid; that said plaintiffs were and are entitled under said sub-lease to mine and ship to the

smelter under the terms, conditions and royalties of the aforesaid sublease, which would have averaged about 37 ounces of silver per ton and about $7.00 in gold per ton, or of the value of $42.00 per ton for said ore, which said leasees could have mined at a net profit of Twelve and 50|100 ($12.50) Dollars per ton to said plaintiffs under the terms and conditions of said sub-lease, and said defendant arbitrarily refused to permit plaintiffs to go on with the aforesaid contract to purchase said stock as aforesaid, without cause.

That the market value of said stock is now seventy cents per share; that since the cancellation and rescission of said lease and refusal of said defendant to permit plaintiffs to mine and ship the said ore necessary to finish buying said stock the said stock has reached the market value of $2.00 per share, and that plaintiffs would have realized a net profit to themsleves, if they had been permitted to mine and ship enough ore to pay for the balance of said stock, in the sum of $1.75 per share.

That by reason of the cancellation and rescission of the said lease, as aforesaid, the plaintiffs have been unable to ship the balance of the ore necessary to finish the said contract of purchasing the said stock, to-wit: 1,300 shares of stock, which they would have realized a net profit of $1.75 per share or $2,275.00.

That by reason of the arbitrary cancellation and recission of said lease by said defendant, without

cause, and the arbitrary ejectment of said plaintiffs from said property by the defendant, and the arbitrary refusal of the defendant to permit the plaintiffs to go on with said lease, and go on and complete said contract to purchase said stock or to enter in or upon the said property, without cause, and the arbitrary refusal of the said defendant to deliver the said 400 shares of stock to plaintiffs, that plaintiffs, have herefore paid for; that the plaintiffs have been damaged in the further sum of $3,075.00 upon this their second cause of action no part of which has been paid. (Tr. 21-26).

The defendant admitted its corporate capacity, that it was operating the Goldsmith Mine, and that Matt W. Alderson was its manager and Superintendent; defendant denied practically every other allegation in the two causes of action; it also plead the following Statutes of Fraud, to-wit:

> "That said pretended contract was and is void under and by virtue of provisions of paragraphs 1 to 5 of section 7519, Section 7593 and Section 7939 of the Revised Codes of Montana 1921."

These allegations are denied by a reply of the plaintiffs.

The plaintiffs introduced evidence in support of the various allegations which are denied by the answers of the defendant.

We shall review and quote some of the evidence which we think is pertinent to the questions involved under the assignments of errors in the Cross-Writ of Error. On the

question of admitting certain exhibits in evidence over the objections of said plaintiffs, assignment of error No. 1 contains the facts which we are concerned with in said assignment of error No. 1, and the facts therein contained read in connection with each of the next five assignments of error will be sufficient facts for the consideration of each.

On the question of the court committing error in sustaining the motion for an instructed verdict as to the second cause of action, we have the following evidence, to-wit:

Batt Tamietti testified as follows:-

> While we were working taking out this ore we had another transaction with the defendant, and that was Mr. Alderson, the manager of the Crystal Copper Company, came with a fellow by the name of Frohock, from Boston, and they came down one morning, in the winze to where we were working, and said they would be glad if we would buy some stock of the Crystal Copper Company. I said I was sure going to buy some, but I couldn't buy any stock for the other fellows, but I was going tonight to Mr. Frank Tamietti's house and we would speak there together and would decide how many shares we were going to buy. So that same evening we went to Frank Tamietti's house all together, myself and Mr. Pete Gaido, and Mr. Lawrence Monzetti and Mr. Frank Tamietti was there too in his house, and Mr. John Pagleero, and Mr. Frohock, and I understood he was from the Crystal Copper

Company, and Mr. Alderson, the manager of the Crystal Copper Company, and so we five partners got together and we decided to buy five thousand shares but never had the money to pay right away, so we spoke together and agreed on the next shipment to pay so much, and decided to pay twenty-five dollars for every shipment we made from the ore, if they were satisfied, and then we spoke to Mr. Alderson and Mr. Alderson spoke with Mr. Frohock, and Mr. Frohock said that was satisfactory enough to the company, and he said, "You fellows have a nice showing there and I wish you would make a million dollars." And he said that was satisfactory to the company, just to pay each twenty-five dollars until this one thousand shares was paid for; twenty-five dollars from each shipment, and, *the first car we shiped Mr. Alderson gave the money to the Crystal Copper Company, and the statement showed that we paid twenty-five dollars each for those shares. We shipped seven cars after entering into this agreement, and there was twenty-five dollars taken out of each car to pay for our stock. I only received five hundred shares, but paid for seven hundred and haven't got the other two hundred shares yet. The stock was made out to me and each of my partners, and was signed by the Crystal Copper Company, and then below that signed by Mr. Matt Alderson, the general manager of the Crystal Copper Company.* In this lead that we struck in the footwall, from the appearance of the ground

I would say that lead ran about the same length as the other in the hanging, and would go from ten to fifteen feet west. Of course the back caught the south lead and caught the north lead in the same way. By the north lead I am referring to the lead in the footwall. This north lead showed up on the 500-foot level. The average width of it was two and a half to three feet. After we drove this cross-cut north into the footwall and discovered this lead, and after we had timbered right close to the breast, we extracted the ore on both sids of this cross-cut and we were intending to work the south lead, but the day after Mr. Alderson, the manager of the Crystal Copper Company came down to my house and told me he say, "I am sorry, Batt, but I have to cancel your lease." So I was suprised, I never said a word, but was suprised, because that was the first time after I was leasing there a long time that we struck ore, and he chased me out. After a little arguing he asked me to show him where Mr. Lawrence Monzetti lived; so I showed him Mr. Monzetti's place, and he told him the same thing. Mr. Lawrence Monzetti asked him if it was for all of us and he said "yes," but then he told us, he said, "I see your car ain't complete yet; you got some ore there in the ore bin, and I don't think you have got fifty ton in there yet, and go up to-night and complete your car, and then your lease is cancelled." We went up at ten o'clock, we used to go out at ten o'clock at night to work, and so we went up

there, me and Pete Gaido and Lawrence Monzetti, and tried to go to work, but Mr. Jim Delong, the engineer of the Crystal Copper Company, came over to me and said, "I am sorry, Batt, but I have got orders from Mr. Alderson to not lower you fellows down." I said, "I am not mad at you; I know you have nothing to do with this; you got your orders. (Tr. 88, 89-80).

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After purchasing this stock in the Crystal Copper Company I kept myself informed as to the market value of the Crystal Copper Company stock. Between the time I purchased the stock and the present time the highest market value of that stock was two dollars and five cents, or something like two dollars. I estimate that I have been damaged in the difference between twenty-five cents and two dollars on three hundred shares of stock, and for two hundred shares of this stock which was never delivered to me. All the stock that has been paid for by the co-partnership has been received by the different co-partners except four hundred shares. (*Tr.* 98).

Pete Gaido testified in part as follows:-

In the month of October we had a stock transaction with Mr. Alderson, manager of the Crystal Copper Company. One day we were working down in the mine and Batt Taimetti and my other partners were there, and Mr. Alderson the general manager of the Crystal Copper Company and a direc-

tor from Boston, if I am not mistaken, Mr. Frohock, came down in the place and Mr. Alderson said, "This man wants to see this place look nice," and it was in good shape, and he said. "Boys, it is in fine shape," and he said, "This is the one place I like to come down to see the ore and pay rock," boys, do everything fine and I hope you make a million dollars, and the company makes something," and he said, "Boys, if you are willing to buy some stock from the company, it would be nice and better for us, and the stock is going up soon." And Batt Tamietti, he told us, we can see about that; of course we cannot buy any stock until we see the other partners some place and we can talk over about it. And so then we met down at Frank Tamietti's house and we had a talk about buying stock there. We agreed to buy five thousand shares, one thousand each for the five partners. We had no money to buy at the present time, and we thought if the company give us a chance to pay at twenty-five dollars every car we shipped. We shipped after that seven cars, and there was twenty-five dollars on each car deducted from the shipment that we made, and we got a certificate for 500 shares. The certificate was in my name and the name of the Crystal Copper Company. I received 500 shares. I paid for 300 more but didn't receive that stock. Received five hundred shares from five cars shipments. The other two cars that were shipped I didn't receive any shares of stock for, but there were deductions made from my checks on

each car. I have not received the shares of stock.

On the 16th of January, 1922, I did not see Mr. Alderson but Batt Tamietti and Lawrence Monetti met down at Batt Tamietti's house and he told me Mr. Alderson was down and told Lawrence Monetti the lease was cancelled on the 16th day of January, 1922. On that day he went up to the Goldsmith mine to go to work, three of us, Batt Tamietti, Lawrence Monzetti and myself, and Tamietti met the engineer from the Goldsmith mine and he told Batt, "I am sorry, but I can't lower you down any more, you fellows." he said, "that is the orders from the Crystal Copper Company and Mr. Alderson." We tried to go down to work that night but it was no use. I told the engineer it was all right "if you got the order." I was willing and ready to keep on with the lease, to keep on with the work, and have been ever since.

At the present time four of us men worked in the winze and drift below the 500-foot level, and after we got through sinking the winze there were five, Frank Tamietti, came to work then, but he was sick at first. After we sank the winze and got through with it us five partners were working together and nobody else, but after that there was a boy working for us, John Arderson was working there for us five partners, and we paid him five dollars and twenty cents a day.

In my opinion it would take about thirty days to have stoped out the ore left in the hanging-wall

lead at the time were ejected from the lease on January 16, 1922, with the six of us working there. In the footwall lead it might give us more trouble, but in my opinion it would take about forty days to have stoped out the ore there, or forty-five days, six men working. There was nobody else working down in the drift and in the cross-cut and in the winze besides us five partners and Mr. Ardenson when we were working there. We were th only ones working there, the only ones taking out ore. (Tr. 124-127).

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In my opinion as a practical miner I would say the ore we discovered along the drift extended up to the 500-foot level. The walls of the vein were parallel. The trend of the vein throughout along the line was parellel. As a practical miner in my opinion I would say that the values of the ore we found along the drift that we shipped to the smelter would continue up in the way I referred, up to the 500-foot level; the ore was right up to the 500-foot level; of course we cannot go in the ground, but it was up to the 500-foot level, and in my opinion the value would be about the same, some little higher and some a little lower, but it is pretty hard to tell that. It was pay rock all the way up. (Tr. 124).

Frank Tamietti testified in part as follows:-

I was working in partnership with Batt Tamietti, Lawrence Monzetti, Pete Gaido and John Pagleero on the 15th of January, 1922, but not the 16th.

I worked in the Goldsmith mine on and after January 15th, and in a winze something like about one thousand feet in a northwesterly direction from the No. 1 shaft on the 500-foot level, and took out some ore there from that winze and shipped it to the smelter. Having examined Plaintiff's Exhibit "Q" I will state I am the same party who is named on the back thereof as Frank Tamietti, in the return. That is the ore that was left there. After they left there was three cars and not any more. We shipped those three cars that was left on this old stope that we had the lease between.

Mr. McCRACKEN.—We will offer exhibit "Q" in evidence. It shows the value was taken from the place after the lease was taken on the part of plaintiff.

Mr. WAGNER.—We object as incompetent, irrelevent and immaterial for any purpose. May it please the Court, the testimony so far discloses that they were operating under a license and got a lease, and therefore plaintiffs are not entitled to (153) recover for any ores thereafter shipped from the mine or any place in the mine.

Examination by the COURT.

The WITNESS.—This is supposed to be the ore taken out the return of shipments from this very same property worked by the plaintiffs, the very same ground that I worked, and I know that because I stayed there until I saw the last car of ore, John Pagleero and I.

The COURT.—The objection is overruled.

Mr. WAGNER.—Exception.

(Document received in evidence, marked Plaintiff's Exhibit "Q" and is as follows:) (Tr. 156-158)

Exhibit "Q" shows that the "Leasers-one-half" of the said three railroad cars shipments of ore as follows: $1,006.74; $1,986.05; and $988.00, or a total of $3,970.-79, showing that there were more ore in the territory leased by the plaintiffs than was required to pay for the balance of the stock contracted for.

The testimony of Matt W. Alderson given at a former trial, introduced at the trial of the instant case, is in part as follows:

Q. State your name, please.

A. Matt W. Alderson

Q. Where were you employed during the year 1921?

A. At the Goldsmith mine in Walkerville.

Q. And what Company owned the Goldsmith mine or was working the Goldsmith mine at that time? A. Crystal Copper Company.

Q. And what position did you hold with the Crystal Copper Company?

A. I was General Manager.

Q. General manager and superintendent?

A. Yes, sir.

Q. I hand you Plaintiff's Exhibit "A" and ask you to state whose writing that is on the back of those smelter returns, if you know?

A. They are all in my writing.

Q. The money was divided up as it purports to be, between the different leasers on this lease?

A. Yes, sir. (Tr. 135-136).

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Q. Have you the two hundred shares of Crystal Copper Company's stock in your possession that belongs to one of the plaintiffs, Batt Tamietti?

Mr. FRANK WALKER.—To which we object as incompetent, irrelevant and immaterial; no bearing on the issues in this case at all.

Mr. McCRACKEN.—That is one of the parts of the damages, they are withholding the stock.

The COURT.—Overruled.

Exception.

A. I don't know as I fully understand the question or the purport of it.

The COURT.—Read the question.

Q. (Question read.)

A. No, sir, I have not.

Q. Do you know where those two hundred shares are? A. I sold them. (133)

Q. You sold them? A. Yes, sir.

Q. You never delivered them?

A. I offered to deliver them and they wouldn't accept them. I offered them to the lawyers, the attorneys.

Q. There was a string tied to that offer, was there not? A. No, sir.

Q. We had to dismiss the suit then pending?

A. Certainly.

Q. And at the time you made the offer, state who those lawyers were you made the offer to.

A. To the gentlemen here, the plaintiffs' attorneys.

Q. Mr Tyvand and myself? A. Yes, sir.

Q. And at that time you had two hundred shares of stock belonging to the plaintiff Pete Gaido, did you not?

A. I had two hundred shares belonging to Pete Gaido and two to Batt Tamietti, yes ,sir.

Q. And you told us you would not deliver them unless we dismissed a certain suit then pending?

A. Of course not.

Q. And you made full settlement on nine cars of ore shipped by these plaintiffs and their co-partners, you paid them all the interest they had coming on the cars?

A. No, sir, there is $11.43 due Batt Tamietti and $11.42 due Pete Gaido. (Tr. 137-139).

O. Are you familiar with the market value of Crystal Copper Company stock? A. Yes,sir.

Q. Since October, 1921? A. Yes, sir.

Q. What was the highest market value of this stock since October, 1921 to the present time?

A. It approached two dollars.

Q. That is per share? A. Yes, sir.

Q. You were general manager all the time between June, 1921 to February, 1922, were you not, Mr. Alderson?

A. Why practically most of that time; they changed my title two or three times, but in fact I was in absolute charge.

O. General Manager? A. Yes, sir. (*Tr.* 139-40)

ASSIGNMENT OF ERRORS UNDER CROSS WRIT OF ERROR.

1

The Court erred in overruling plaintiffs' objections to the testimony given by the witness Lawrence Monzetti and the offer in evidence of Defendant's Exhibits "J." "K," "L," "M," and "N," as follows:

"This is my signature on Defendant's Exhibit 'J.' That is my name on the front, this is my name on the front of Defendant's Exhibit 'L'. That is my name on the back; this is my name on Defendant's Exhibit 'K'; that is my signature on Defendant's Exhibit 'M,' and that is my name on the front.

"Mr. WALKER.—If the Court please, we now offer in evidence Defendant's Exhibits 'J,' 'K,' 'L,' 'M,' and 'N.'

"Mr. McCRACKEN.—Plaintiffs object to the introduction of exhibit 'J,' upon the grounds and for the reasons that the same is irrevelant and immaterial and not within the issues of this case, furthemore the same does not prove or tend to prove any of the issues of this case.

"The COURT.—The objections is overruled.

"Exception.

"Mr. McCRACKEN.—Plaintiffs object to the introduction of exhibit 'K,' upon the grounds and for the rea-

sons that the same is irrevelant and immaterial and not within the issues of this case, furthemore the same does not prove or tend to prove any of the issues of this case, also it fails to show any consideration for any pretended release as to the 300 shares of stock claimed by Monzetti, as he received nothing more than that which he had coming at that time.

"The COURT.—The objection is overruled.

"Exception.

"Mr. McCRACKEN.—Let the record show that plaintiffs make the same objection to exhibit 'L' as plaintiffs made to exhibits 'J' and 'K'.

"The COURT.—Let the record so show and that the objection is overruled.

"Exception.

"Mr. McCRACKEN.—Plaintiffs make the same objection to exhibit 'M' as made to exhibits 'J,' 'K,' and 'L.'

"The COURT.—Let the record show same objection and that the objection is overruled.

"Exception.

"Mr. McCRACKEN.—Plaintiffs object to the introduction of exhibit 'N,' upon the grounds and for the reasons that the same is irrelevant and immaterial and not within the issues of this case, furthermore the same does not prove or tend to prove any of the issues of this case, also it fails to show any consideration for any pretended release by Monzetti as he received nothing more than that which he had coming at that time.

"The COURT.—The objection is overruled.

"Exception.

"(Documents received in evidence, marked Defendant's Exhibits 'J,' 'K,' 'L,' 'M,' and 'N,' and are as follows:)

"DEFENDANT'S EXHIBIT 'J.'

Butte, Montana, March 4, 1922.

Pay to the order of Lawrence Monsanti $100.00—One hundred and no|100—Dollars.

MATT W. ALDERSON.

To W. A. Clark Brothers,
93-1 Bankers 93-1,
Butte, Montana.

(Endorsed across face:)

W. A. Clark & Brothers, Bankers.
Paid
Mar. 6, 1922.
Butte, Montana.

(Endorsement on the back of above exhibit:)

Lawrence Mansanti. Paid.

"DEFENDANT'S EXHIBIT 'K.'

Butte, Mont., Mar 4, 1922.

Received of Matt W. Alderson One Hundred Dollars in full for my 200 shares of stock in the Crystal Copper Co. and for any real or implied right which I may have for the purchase of 300 shares additional.

LAWRENCE MOZETTI.

Witness:

"DEFENDANT'S EXHIBIT 'L.'

Crystal Copper Co.

Butte, Montana, March 4, 1922.

Pay to the order of Lawrence Monsanti—$11.43—Eleven & 43|100 Dollars.

CRYSTAL COPPER CO.

(9) By Matt W. Alderson.

to the First National Bank of Butte, Montana.

93-2.

(Endorsements on the back of above exhibit:)

This check is issued in payment for services of for bill rendered to Mar. 4, 1922, for his part of Car 58763. If incorrect do not endorse but return to have matter made right. Endorsement and cashing means its acceptance in full.

LAWRENCE MANSANTI.

Paid: 3-6-22.

"DEFENDANT'S EXHIBIT 'M.'

Crystal Copper Co.

Butte, Montana, Feb. 1, 1922.

Pay to the order of Lawrence Mansanti—$80.85—Eighty & 85|100 Dollars.

CRYSTAL COPPER CO.

(9) By Matt W. Alderson.

To The First National Bank, Butte, Montana 93-2.

(Endorsement on back of above exhibit:)

This check is issued in payment for services or for bill rendered to Jan. 31, 1922, or for his part lot 5-E, B. If incorrect do not endorse but return to have matter made right. Endorsement and cashing means its acceptance in full.

LAWRENCE MANSANTI.

Paid 2-1-22.

"DEFENDANT'S EXHIBIT 'N.'

Butte, Montana, March 4th, 1922.

Received of the Crystal Copper Company, a corporation, of Butte, Montana, the sum of Eleven & 43|100 Dollars, being my proportionate share in all ores shipped in the name of the Crystal Copper Company, a corporation, by me, as a co-partner with others with whom I was interested in a certain lease.

This payment is acknowledged by me as full and complete settlement and satisfaction of any and all claim or claims that I may have against the said Crystal Copper Company, and as full and complete satisfaction of any and all demands that I may have against the Crystal Copper Company, the corporation aforesaid.

LAWRENCE MOSETTI.

Witness:

MATT ALDERSON.

2

The Court erred in denying plaintiffs' motion to strike from the evidence certain evidence, to-wit:

"Mr. McCRACKEN.—If the Court please, plaintiffs move the Court to strike from the evidence defendant's Exhibit 'J,' upon the grounds and for the reasons that the same is irrelevant, that no consideration has been shown for the same, as Monzetti received nothing more than that which he had coming at that time, furthermore, the signature was obtained at a time Monzetti was incompetent to act and did not know what he was doing, furthermore, he was unable to read or write, also it does not prove or tend to prove any of the issues in this case as no release was plead in the answer.

"The COURT.—The motion will be denied.

"Exception."

3

The Court erred in denying plaintiffs' motion to strike from the evidence certain evidence, to-wit:

"Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit 'K,' as was made to exhibit 'J.'

"The COURT.—Let the record show the same motion as to Defendant's Exhibit 'K,' and that the motion is denied.

"Exception."

4

The Court erred in denying plaintiffs' motion to strike from the evidence Defendant's Exhibit 'L,' which motion is as follows:

"Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit 'L,' as was made to exhibits 'J' and 'K.'

"The Court.—Let the record show the same motion as to Defendant's Exhibit 'L,' and that the motion is denied.

"Exception.' '

5

The Court erred in denying plaintiffs' motion to strike from the evidence Defendant's Exhibit "M," which motion is as follows:

"Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit 'M,' as was made to exhibits 'J,' 'K,' 'L.'

"The COURT.—Let the record show the same motion as to Defendant's Exhibit 'M,' and that the motion is

denied.

"Exception."

6

The Court erred in denying plaintiffs' motion to strike from the evidence Defendant's Exhibit "N," which motion is as follows:

"Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit 'N,' as was made to exhibits 'J,' 'K,' 'L,' 'M.'

"The COURT.—Let the record show the same motion as to Defendant's Exhibit 'N,' and that the motion is denied.

"Exception."

XX 7 XX

The Court erred in granting defendant's motion for a direct verdict at the close of all the evidence in the case as to the second cause of action contained in the amended complaint in this action; which motion is in words and figures, as follows:

The Defendant now moves the Court to direct a verdict in favor of the defendant and against the plaintiffs on the grounds and reasons following:

First: There is a fatal variance between the allegation and the proof in this, that plaintiffs rely for a recovery upon the proposition as alleged in their complaint that the plaintiffs were and are a mining co-partnership, engaged in mine sub-leasing and sub-letting from the defendant Crystal Copper Company, whereas the proof affirmatively shows and discloses that the relationship of mining partners does not and never did exist between these parties

in so far as their negotiations and work for the defendant was concerned, that the proof affirmatively discloses that they were operating and working under a license and not a lease, and that their relationship was nothing more than that of working agreement for a share of the profits.

There is a fatal variance because the parties Lawrence Monzetti and Batt—the plaintiffs Pete Gaido and Batt Tamietti, if they have any cause of action at all against the defendant it would be as individuals for work, labor and services performed.

Next: That the evidence is insufficient in law to prove a mining co-partnership between the plaintiffs in their relation with the defendant in this case. The evidence is insufficient to prove a lease between the plaintiffs and the defendant, and the evidence establishes if it establishes any contractual relationship at all, a contract embodying a license. The evidence is insufficient to establish a lease for the reason that a lease of (a) the real property of a mining corporation may only be secured by compliance with the provisions of section 6004 of the Revised Codes of Montana, 1921, which requires affirmative approval of the stockholders and the board of directors.

Next: The evidence is insufficient to warrant a recovery by the plaintiffs or any of them, upon the theory that they are a mining co-partnership because under the express provisions of section 8059 of the Revised Codes of Montana of 1921, the acts and deeds and things of a majority of the members of such partnership controls all acts of the parntership, and it affirmatively appears in this case that a majority of the members of the so-called partnership

have no interest in this litigation, and the same may not be maintained by a minority of the members.

Next: The evidence is wholly insufficient to prove any damages sustained by the plaintiffs or any of them in the event the Court should hold that they were operating under a lease and not a license for the reason that the evidence pertaining to proof of prospective profits or damages by reason of the cancellation of the lease falls short of giving to the jury any tangible basis upon which to base any rational judgment as to damages, but that it would require speculation and conjecture to reach any verdict, and the same would be the result of mere guess-work having no foundation in the evidence in this case, particularly for the reason that there is no evidence showing or tending to show how long it would have required the plaintiffs to mine the ore in place which they contend they were deprived of mining, nor the cost of mining such ore nor the incidental expenses, or work or labor necessary to prepare the ore for shipment nor is there any evidence in this case showing that the ore if mined could have been smelted for, nor what proportion of the net profits of such ore proportionate of the net profits in dollars would accrue to plaintiffs. There is no evidence before the Court showing what the market price of the metals contained in the ore and from which the plaintiffs would derive net proceeds was or would be.

Further, the contract contended for by the plaintiffs as alleged in their complaint is one void under the statute of fraud of the State of Montana, and the proof in this case discloses that the contract contended for in the com-

plaint is not a lease but a working contract or license.

These matters being directed to the first count.

Upon the second count we urge all of these matters and in addition that plaintiffs may not recover under the second count under any theory of the case for the reason that it affirmatively appears from the evidence in this case that any stock transactions or transactions for the capital stock of the Crystal Copper Company were had with Matt W. Alderson as an individual; and not as a representative of the defendant company, and for the further reason that there is no evidence in this case to prove any damages which plaintiffs sustained or might have sustained by reason of non-delivery on any stock to them to be earned in the future. That the measure of damages for breach of agreement to sell personal property not paid for, is fixed by statute, particularly sections 8674 and 8700 of the Revised Codes of Montana of 1921. There is no evidence to show the measure of damages as fixed by these sections of the code, in that the evidence fails to disclose that the value of the property of the stock in question was the market price thereof and the price at which it might have been bought or its equivalent bought in the market nearest the place where the stock should have been delivered or would have been delivered and put into the possession of the plaintiffs if entitled thereto at all at such time after the breach of duty upon which plaintiffs rights or the rights of any of the plaintiffs to damages accrued or within such time as would suffice with reasonable diligence for them to have been purchased the stock at the nearest or in the open market.

As directed to all of the evidence and to both counts of the complaint, the evidence wholly fails to show any measure of damages in that it fails to disclose the cost of removing the ore the plaintiffs claim they were deprived of mining or the number of men it would have been necessary to employ to remove it or how many of the partners or alleged partners, or the labor of how many of the partners or alleged partners would be required to remove it or the cost of them mining, would have been.

And for the further reason that the evidence wholly fails to disclose that the partnership as a mining partnership or otherwise, collectively or individually was ready, willing and able to perform its part of the contract alleged or would have performed it as a mining partnership or as individuals had they not been interrupted by the acts of the agent of the company.

The COURT.—The motion of the defendant is granted as to the second count in the complaint, and the jury will be instructed to find for the defendant on the second count.

Mr. WALKER.—Note an exception to the ruling of the Court.

Mr. TYVAND.—We ask for an exception.

8

The Court erred in receiving the verdict which is, excepting the title of the court and cause, as follows:

"VERDICT."

We, the jury in the above-entitled court and action find our verdict in favor of the plaintiffs, Batt Tamietti and Pete Gaido, and against the defendant and assess

plaintiffs' damages in the sum of Seven Hundred Seventy & 66|100 ($770.66) Dollars, each.

(Signed) M. V. CONROY,
Foreman."

And in entering judgment in accordance therewith.

ARGUMENT.

ASSIGNMENT OF ERRORS NUMBERED I. II, III, IV, V and VI.

Under the Assignment of Error numbered 1 there are several legal points we desire to present and discuss. There are five exhibits admitted in evidence, over the objections of the plaintiffs, under one offer in evidence of the said five exhibits, to-wit: "J," "K," "L," "M," and "N," (Tr. 130) and (Tr. 44-45)

There are five seperate motions to strike said exhibits from the evidence in this case. (Tr. 45-46) These five motions are set out in assignments of errors numbered from 2 to 6, both inclusive. Since the assignment of error numbered 1 involves about the same legal points as the next five assignments of errors, we shall therefore discuss the first six assignments of errors under one head.

Exhibit "J" is a check by Matt W. Alderson in favor of Lawrence Monzetti. According to the testimony in this case, it was given in payment by Mr. Alderson to Mr. Monzetti for 200 shares of corporation stock, Mr. Monzetti held in the Crystal Copper Company, and it is not within the issues and has no bearing on any issues in this case. (Tr. 177))

Exhibit "K" is a purported receipt and release from Lawrence Monzetti to Matt W. Alderson for said 200

shares of corporation stock, which Mr. Alderson had purchased from Mr. Monzetti mentioned above in connection with exhibit "J", and is a purported release for the right to purchase 300 shares additional. It is not within the issues and has no bearing on any of the issues in the instant case. (Tr. 177).

Exhibit "L" is a check for $11.43 in favor of Lawrence Monzetti by the Crystal Copper Company as his cash payment of his share of the 10th, or last, carload of ore shipped, after a deduction by said company had first been made of $25.00 for 100 shares of its stock which plaintiffs had purchased from said company, and there is no issue in this case on that and should not have been admitted in evidence. (Tr. 177).

Exhibit "M" is another check by the Crystal Copper Company of $80.85 to Lawrence Monzetti for his share of the cash payment on the 9th carload of ore shipped, after the said company had deducted $25.00 for 100 shares of its stock which plaintiffs had purchased from the Crystal Copper Company. This has no bearing on the issues in the instant case. (Tr. 177).

Exhibit "N" and the plaintiffs' objections to its introduction in evidence are as follows:

"DEFENDANT'S EXHIBIT 'N.'

Butte, Montana, March 4th, 1922.

Received of the Crystal Copper Company, a corporation, of Butte, Montana, the sum of Eleven & 43|100 Dollars, being my proportionate share in all ores shipped in the name of the Crystal Copper Company, a corporation, by me, as a co-par-

tner with others with whom I was interested in a certain lease.

This payment is acknowledged by me as full and complete settlement and satisfaction of any and all claim or claims that I may have against the said Crystal Copper Company, and as full and complete satisfaction of any and all demands that I may have against the Crystal Copper Company, the corporation aforesaid.

LAWRENCE MOSETTI.

Witness:

MATT ALDERSON.

Filed Dec. 15, 1924. C. R. Garlow, Clerk."

"Mr. McCRACKEN.—Plaintiffs object to the introduction of exhibit 'N,' upon the grounds and for the reasons that the same is irrevlevant and immaterial and not within the issues of this case, furthermore the same does not prove or tend to prove any of the issues of this case, also it fails to show any consideration for any pretended release by Monzetti as he received nothing more than that which he had coming at that time.

"The COURT.—The objection is overruled.

"Exception.

"(Documents received in evidence, marked Defendant's Exhibits 'J,' 'K,' 'L,' 'M,' and 'N,' and are as follows:)

After said exhibit "N" was admitted in evidence and Mr. Monzetti had been cross-examined by the plaintiffs' attorneys, the following motion to strike it from the ev-

idence was made, and the following ruling was made, to-wit:-

"Mr. McCRACKEN.—If the Court please, plaintiffs move the Court to strike from the evidence Defendant's Exhibit 'J,' upon the grounds and for the reasons that the same is irrelevant, that no consideration has been shown for the same, as Monzetti received nothing more than that which he had coming at that time, furthermore, the signature was obtained at a time Monzetti was incompetent to act and did not know what he was dong, furthermore, he was unable to read or write, also it does not prove or tend to prove any of the issues in this case as no release was plead in the answer.

"The COURT.—The motion will be denied.

"Exception."

"Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit 'N,' as was made to exhibits 'J,' 'K,' 'L,' 'M.'

"The COURT.—Let the record show the same motion as to Defendant's Exhibit 'N,' and that the motion is denied.

"Exception."

RELEASE NOT PLEAD

This purported release, exhibit "N," was not plead in the defendant's answer, and therefore was entitely outside of the issues in this case. It therefore should not have been admited in evidence. Among some of the authorities on this question are the following:-

"A release by the plaintiff must be specially plead-

ed." Sutherland Code Pleading Pratice and Forms, Vol. 1, Sec. 532.

"A release, to be available as a defense to an action for debt should be affirmatively set forth in the answer." Collier vs. Field, 2 Mont. 320, 324.

"New matter must be specially pleaded; and whatever admits that cause of action, as stated in the complaint, once existed, but at the same time avoids it —that is, shows that it has ceased—is new matter. It is that matter, which the defendant must affirmatively establish. Such are release, and accord and satisfaction, Defense of this Character must be distinctly set up in the answer, or evidence to establish them will be inadmissable. This view disposes of the appeal and necessitates a reversal of the judgment." Coles vs. Soulsby, 21 Calif. 47, 50.

"As a general rule a release of a cause of action is not available as a defense unless specially pleaded." 34 Cyc. 1094.

8 Pac. Digest. Release Secs. 44 and 45.

42 Cent. Digest. Release Secs. 86—89.

Grimwald vs. Freezs, (Calif.) 34 Pac. 73.

NO CONSIDERATION FOR RELEASE.

Further, the testimony shows that the purported release was given without any consideration being paid therefor. Mr. Monzetti testified in part as follows:-

"He, Mr. Alderson, did not pay me any money other than that what I already had coming for ores shipped before I signed the instrument; just paid what I already had coming. He did not give me

any stock other than what I already had paid for before I signed the instrument. Exhibit "N" was signed at the same time exhibit "K" was signed; both signed the same time. In signing exhibit "K" the defendant nor Mr. Alderson gave me anything other than what I had coming at the time I signed them, that is what I had coming for ore already shipped, and stock I had already paid for. He did not make any explaniation to me that it would be a release to the company on the suit then pending; he said nothing about a suit then pending. (Tr. 176-177).

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I don't read or write the English language very much. I cannot read exhibit "K"; couldn't read it; couldn't read Defendant's Exhibit "N." (Tr. 177).

In support of our contention that a release without a consideration is void and of no effect, we submit the following authorities:-

"A release of a legal obligation for which the consideration is the performance by the releasee of some other undisputed duty owing by him to the releasor or to a third person is invalid for want of consideration. So the full performance of one obligation is not consideration for the discharge of that obligation and the release of a second obligation."

(numerous cases cited in the foot note).

34 Cyc., page 1051, Sec. 3.

The payment of Eleven & 43|100 Dollars by the defendant to Lawrence Monzetti, was his proportionate

share of the ore shipped in the last, or 10th carload of ore, after $25.00 had been deducted for 100 shares of stock in said corporation, and it was the "undisputed duty by" the defendant to the said plaintiff to pay him the said amount as his share in the returns from the said carload, and therefore could not be a valid consideration for a release of other claims. (Tr. 177) The authorities are agreed on this question, and the following are some of them, to-wit:-

Fire Ins. Ass. vs. Wickman, 141 U. S. 564-582; 35 L. Ed. 860; 12 Supt. Ct. 84.

C. M. & St. P. Ry. Co., vs. Clark, 178 U. S. 353-373; 44 L. Ed. 1099; 20 Supt. Ct. 924.

Roses Notes Vol. 15, page 860.

Roses Notes Vol. 18, page 585.

Whitaker etc. vs. Standard etc., 51 L. R. A. (N. S.) 315 (note).

20 L. R. A. 785-786 (note).

11 L. R. A. 711 (note)

We submit that admitting the said exhibit "N" in evidence in this case is reversable error, both, because there was no consideration for it and therefore was invalid, and next because the purported release, exhibit "N", was not plead which the law requires of the defendant, when it relies on a release for a defense. If it had been plead, then the plaintiffs could have properly plead their defense of fraud, no consideration and such other defense as they may have had and been propertly prepared to have met the defendant at the trial on the issues in the case. This contention applies to both causes of action set out in the

amended complaint in this case.

ASSIGNMENT OF ERROR NUMBERED VII

Assignment of error numbered VII is, that the court erred in granting the defendant's motion for an instructed verdict in its favor as to the second cause of action. (Tr. 181-185) The allegations of the second cause of action, as set forth, shows a contract to purchase, by the plaintiffs, of 5000 shares of stock in the defendant corporation. The uncontradicted evidence shows, that 3700 shares of stock have been paid for and have been delivered by the said defendant to the said plaintiffs, and that 400 shares of stock have been paid for by the plaintiffs and the defendant has refused to deliver them after demand by the plaintiffs, and the defendant has sold them to somebody else; (Tr. 137-138) that 900 shares have not been paid for, nor have they been delivered by the defendant to the plaintiffs, because of the defendant having refused and is refusing and keeping the plaintiffs from going into the Goldsmith Mine to mine the ore under their sub-lease with the defendant; that the plaintiffs have been ready and willing to extract ore under the said sub-lease, and thus pay for their 900 shares of stock in said corporation, but the defendant, by its said action, has refused to permit plaintiffs to thus pay for their said 900 shares of stock; that the defendant has permitted and assisted other persons than said co-partnership, to mine the ore from the territory sub-leased to the said co-partnership, and such other persons have mined the ore out of said territory amounting to $3,970.69, which belonged to the said co-partnership, (Tr. 156-158 exhibit "Q") and $225.00 is the

amount which would have paid for the 900 shares, in full.

The foregoing evidence shows that the defendant converted both the 400 shares already paid for and the 900 shares it would not let plaintiffs pay for under the sublease. In support of the defendant having converted the said 1300 shares of stock, we have the following authorities, to-wit:-

> "A corporation converts shares of stock where it totally denies a shareholder his rights as such shareholder and repudiates its obligations to him as such; as where for example, it wrongfully refuses to make a transfer of stock on the corporate books as required by statute; or unwarrantably sells or forfeits shares for a non-payment of assessments; or practically deprives a share holder of his stock by bidding it in at a pretended sale under its by-laws. In the latter case trover will lie, although the sale was in fact illegal and void, as not having been conducted in compliance with the by-laws purporting to authorize it. So, a direction by a corporation to an agent holding stock for delivery to a subscriber on payment of the subscription price, to return the stock, and the subsequent action of the board of directors in making the certificates "Forfeited," has been held to constitute a conversion of the subscriber's shares. In the case of conversion by the corporation by selling the stock without authority, the wronged owner or his assignee may maintain his action without surrendering the certificates of stock." (Numerous cases cited).

Thompson on Corporations, 2nd Addition, Vol. 4, Sec.3492.

> "There is some conflict in the authorities as to whether the valuation shall be that prevailing at the time of the actual conversion of the stock or the highest market price between the time of the conversion and the demand, or the highest price between the conversion and the trial, or the highest intermediate value between the time of conversion and a reasonable time after the owner has received notice of the conversion to enable him to replace the stock. *The latter rule is generally accepted by the courts, and is most strongly supported by reason and consideration of fair ess.* 'To adopt' says the Indiana Supreme Court, 'the value as existing at the time of actual conversion would enable the converting holder to make the market for the owner and deprive him of his stock, whether he so wills or not. etc. "

Thompson on Corporations, 2nd Addition, Vol. 4, Sec. 3496.

Section 8689 of the Revised Codes of Montana of 1921, on the question of damages in cases of conversion of personal property, is to the same effect as the foregoing section from Thompson on Corporations. In the instant case, at this time, we are not so much concerned with particular rules of damages as we are to show that there was evidence before the court, as to the second cause of action, to have entitled the plaintiffs to have had said cause of action submitted to the jury for their consideration. The trial

Judge in granting the defendant's motion for an instructed as to the second cause of action, clearly is a reversable error under the foregoing facts and the law applied thereto.

We submit that reversable error has been made as to both causes of action in this case, and that it therefore should be reversed and remanded for a new trial as to both causes of action.

Respectfully submitted,

H. A. TYVAND and F. E. McCRACKEN,

Attorneys for Cross-Plaintiffs in Error,

507 Silver Bow Block, Butte, Montana.

No. 4486

IN THE

United States Circuit Court of Appeals

FOR THE NINTH DISTRICT

LAWRENCE MONZETTI, PETE GAIDO,
BATT TAMIETTI, JOHN PAGLEERO
and FRANK TAMIETTI,

Cross-Plaintiffs in Error

vs.

CRYSTAL COPPER COMPANY,
a Corporation,

Cross-Defendant in Error

CROSS DEFENDANT IN ERROR'S BRIEF

WALKER & WALKER and C. S. WAGNER,
Attorneys for Cross-Defendant in Error,
409 Silver Bow Block, Butte, Montana

MURPHY-CHEELY, PRINT

No. 4486

IN THE

United States Circuit Court of Appeals

FOR THE NINTH DISTRICT

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLEERO and FRANK TAMIETTI,

Cross-Plaintiffs in Error

vs.

CRYSTAL COPPER COMPANY, a Corporation,

Cross-Defendant in Error

CROSS DEFENDANT IN ERROR'S BRIEF

We respectfully contend that the alleged errors assigned in cross-plaintiffs in error's brief should not be considered at all by this court unless this court shall first find:

I.

That the cross-plaintiffs' in error were a mining co-partnership.

II.

That they were operating under a lease and not a license.

III.

That there was a breach of contract adequately pleaded and proved so as to entitle the cross-plaintiffs' in error to judgment for loss of prospective profits, proximately resulting from the alleged breach.

IV.

That the judgment now before the court should be affirmed as to Gaido and Tamietti.

Cross-plaintiffs' in error's assignments will be briefly discussed in the order in which they are presented their brief.

ASSIGNMENTS 1, 2, 3, 4, 5, 6:

It is contended the release (exhibit N) was not pleaded in defendant's answer, and was therefore not within the issues of the case.

We concede the general rule to be that a release of a cause of action frequently presents the issue requiring an affirmative plea by way of answer and the release presupposes that plaintiff has surrendered a valid right or cause of action for a valid consideration. If Monzetti was not a member of a mining co-partnership and operating with his colleagues under a license then he was not harmed by the action of the court in admitting the exhibits in evidence for the very evident reason that no cause of action existed in his favor against the company.

However, conceding the general rule to be as above

stated, plaintiff must take advantage of his rights in order to preclude testimony of the character complained of. At the trial no objection was made to the reception of the Exhibit, because the pretended release of Monzetti was not pleaded. There was only a general objection (Trans. 101-102.) But counsel for Monzetti after the exhibt was introduced in evidence moved to strike it with other exhibits upon the ground among others, that no release was pleaded in the answer.

(Trans. 179-180.)

The motion came too late. Counsel was not at liberty to include other grounds of objection upon their motion to strike.

> "When a party sits by at a trial and allows evidence to be introduced without objection, he cannot thereafter assert that the court was in error in refusing to strike it out. 'Yoder v. Reynolds, 28 Mont. 183, 72 Pac. 417; Poindexter & Orr Livestock Co. v. Oregon Short Line Ry. Co., 33 Mont., 338, 83 Pac. 886; Bean v. Missoula Lumber Co., 40 Mont., 31, 104 Pac. 869; State v. Rhys, 40 Mont. 131, 105 Pac. 494; Sate v. Van, 44 Mont. 374, 120 Pac. 479.) The rule announced in these cases applies here. The permission of the court given at the time the ruling was made that the evidence was admissible, to later move to strike it out, did not warrant the assumption by counsel that they were at liberty to include other grounds of objection when they came to make the motion."
>
> Genzberger v. Adams, 62 Mont. 430.

The reception of these exhibits cannot be said to have been introduced for the purpose of avoiding any pretended cause of action of Monzetti for the company never confessed that he had any cause for action whatsoever. Exhibit "N" is in the nature of an admission upon Monzetti's part that he had no cause of action against the company hence they tende to destroy his claims.

Under the rules of pleading prevailing in the Montana jurisdiction, we think the exhibts were admissible under the general denial.

> "It logically follows that under his general denial the defendant may introduce any evidence which tends to controvert any fact material to plaintiff's case and if he is successful in overcoming the prim facie case disclosed by plaintiff's evidence, as a whole, or in any particular, or in establishing an equipoise in the proof, he is entitled to a verdict. (Ency. Pl. & Pr. 871; De Sando v. Missoula L. & W. Co.., 48 Mont. 226, 136 Pac. 711; Stephens v. Conley, 48 Mont. 352, Ann. Cas. 19159, 958, 138 Pac. 189.) These rules apply to all actions, whatever their nature for the provisions of the Codes on the subject of pleadings cited supra, furnish the exclusive guide as to what pleadings are required or are permitted in this jurisdiction. As applied to an action on a contract resting in parol, the plaintiff must allege the contract upon which he seeks to recover a substantial performance of it according to its terms, a breach by the defendant, and the facts showing the amount he is entitled to recover. A general denial by defendant puts in issue all of these allegations. The burden is then cast upon the plaintiff to establish all of them

> by substantial evidence. If, for instance, he fails to establish the contract alleged, he fails to make out a cause of action (Kalispell Liquor & Tobacco Co. v. McGovern, 33 Mont. 394, 84 Pac. 709), and the defendant is entitled to a non-suit. So the defendant under his general denial, may introduce any evidence which tends to show that he did not enter into the contract, or that he made a contract different in one or more substantial particulars from the alleged, or that the plaintiff has failed to fulfill the obligations assumed by him therein according to its terms, or any other fact, which tends to destroy, not to avoid, the cause of action alleged."
>
> Chealey v. Purdy et al., 54 Mont. 489.

If the judgment now before the court is invalid as to Gaido and Tamietti, it follows as a matter, of course, that the errors above complained of are without substance.

Complaint is made that the so called release was without consideration, but the evidence submitted on this issue was submitted to the jury under proper instructions and the jury by its verdict necessarily must have found that the release was founded upon adequate consideration, and we submit that error may not be predicated upon a question of fact which has been resolved by the jury if there be any substantial evidence to support it at all.

ASSIGNMENT OF ERROR No. 7

We submit the court properly granted a direct verdict as to the second count of the complaint. One

of the grounds urged to support of the motion for a directed verdict on the second count was that the evidence in the case discloses that any stock transaction or transactions for capital stock of the Crystal Copper Company were had with Matt W. Alderson as an individual and not as a representative of the Company. This contention is amply borne out by the evidence had at a former trial of this case. Matt W. Alderson was called as a witness on behalf of the plaintiffs (Trans. 134 et seq.), and he having died the testimony he gave at the former trial was introduced at the second trial of this cause. His testimony is positive unequivocal that he was acting as an individual and not as a representative of the company on the stock transactions (Trans. 144) and that all stock transactions were had with him in the capacity of an individual, and that it was his stock he was dealing with and not that belonging to the defendant company. A party is bound by the testimony of his own witness.

Sommerville v. Greenhood, 65 Mont. 101-120.

Furthermore, the plaintiffs utterly failed to prove any damage whatsoever on these stock transactions. Damages in such cases are governed by Statute in Montana.

> "8700. Value-How estimated in favor of buyer. In estimating damages, except as provided by the next two sections, the value of property to a buyer or owner thereof, deprived of its possession, is deemed to be the price at

which he might have bought an equivalent thing in the market nearest to place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice with reasonable diligence, for him to make such a purchase."

Sec. 8700 Revised Codes of Montana 1921.

"8674. Breach of agreement to sell personal property not paid for, The detriment caused by the breach of a seller's agreement to deliver personal property, the price of which has not been fully paid in advance, is deemed to be the execess, if any, of the value of the property to the buyer over the amount which would have been due to the seller under the contract, if it had been fulfilled."

Sec. 8674 Revised Codese of Montana, 1921.

It is plain that the plaintiffs did not bring themselves within the provision of either of these two sections in the matter of proof, hence the court's action in granting a directed verdict on the second count was doubly justifiable.

Respectfully submitted,

WALKER & WALKER
and C. S. WAGNER

No. 4486

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT 18

CRYSTAL COPPER COMPANY,
A Corporation,
Plaintiff in Error

vs.

PETE GAIDO and BATT TAMIETTI,
Defendants in Error

PLAINTIFF IN ERROR'S PETITION FOR REHEARING

WALKER & WALKER and C. S. WAGNER,
Attorneys for Plaintiff in Error,
409 Silver Bow Block, Butte, Montana

MURPHY-CHEELY, PRINT

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CRYSTAL COPPER COMPANY,
A Corporation,
Plaintiff in Error,

vs.

PETE GAIDO and BATT TAMIETTI,
Defendants in Error.

4486

PETITION FOR REHEARING:

Comes now Crystal Copper Company, a corporation, plaintiff in error in the above entitled cause, and moves the court for a rehearing for that the court erred in deciding:

"In view of a retrail of the action * * *"

This court in its opinion, correctly defined the issues as follows:

> "The principal question discussed in the briefs of counsel and on the oral argument before this court is:Was there a sublease of the mine from the defendant to the plaintiffs and were they mining partners, as that relation is defined by the Code of Montana?"

This court correctly held that:

> "The above testimony is as favorable to the contention made in behalf of the plaintiffs as any to be found in the record and we have little hesitation in saying that it falls far short of establishing such an interest in the mine as will support the claim that a mining partnership existed between those actually engaged in working the mine. Wheeler v. West, 71 Cal. 126; Hudepohl v. Mining and Water Co., 80 Cal. 553; Micalek v. New Almaden Co., supra."

It is quite apparent from the decision of the court that no issuable facts remain to be decided and any retrial of the action would necessarily involve great expense to the parties and would be fruitless.

From the opinion of this court it is manifest that no mining partnership existed between the parties and that none of the parties acquired any interest in the mine, and it follows as a matter, of course, that if any of them have claim against the Crystal Copper Company, it must necessarily be upon a quantum meruit for work, labor and services performed.

The opinion should therefore be modified by striking therefrom the words: "In view of a retrial of the action," and substituting therefor the words: "In view of a final decision."

Respectfully submitted,

C. S. WAGNER,
WALKER & WALKER
Attorneys for Plaintiff in Error

STATE OF MONTANA, }
COUNTY OF SILVER BOW, } ss.

I, Thomas J. Walker, one of the attorneys for the Crystal Copper Company, a corporation, plaintiff in error, in the above entitled cause do hereby certify and declare that the above entitled motion for rehearing is in my judgment well founded and that the said petition is not intersposed for delay.

Dated this 16th, day of June, 1925.

THOMAS J. WALKER

No. 4487

United States

Circuit Court of Appeals

For the Ninth Circuit. 19

A. J. VAUGHT,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4487

United States

Circuit Court of Appeals

For the Ninth Circuit.

A. J. VAUGHT,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES OF ATTORNEYS OF RECORD.

For Defendant and Plaintiff in Error:
WILLIAMS, KELLY & McDONALD, Mills Building, San Francisco, Cal.

For Plaintiff and Defendant in Error:
UNITED STATES ATTORNEY, San Francisco.

In the Southern Division of the United States District Court for the Northern District of California.

No. 16,120.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MAX A. STEARNS, A. J. VAUGHT, J. HIERONIMUS, JOHN BEMAS and JOHN DOE,
Defendants.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of Said Court:

Please prepare certified transcript on writ of error of the following pleadings, papers and orders:

1st. Information.
2d. Verdict of jury.
3d. Sentence and judgment.
4th. Bill of exceptions as settled by trial judge.

5th. Petition for writ of error.
6th. Order allowing writ of error.
7th. Assignment of errors.
8th. Bond of cost.
9th. Writ of error.
10th. Citation on writ of error.
11th. Praecipe for certified transcript.
12th. Motion of defendant Vaught for a directed verdict.
13th. Petition to exclude evidence and exhibits annexed thereto. [1*]
14th. All minute orders.
15th. Defendants' proposed instructions to jury.

Dated March 17, 1925.

WILLIAMS, KELLY and McDONALD,
Attorneys for A. J. Vaught, Defendant and Plaintiff in Error.

[Endorsed]: Filed Mar. 17, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,120.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MAX A. STEARNS, A. J. VAUGHT, J. HIERONIMUS, JOHN BEMAS and JOHN DOE,

Defendants.

INFORMATION.

At the November term of said court in the year of our Lord one thousand nine hundred and twenty-four,

BE IT REMEMBERED that Sterling Carr, United States Attorney for the Northern District of California, by and through Kenneth C. Gillis, Special Assistant to the United States Attorney, for the United States in its behalf prosecutes in his own proper person, comes into court on this, the 23d day of December, 1924, and with leave of the said Court first having been had and obtained, gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true are made certain and supported by a

special affidavit made under oath, and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof;

NOW, THEREFORE, your informant presents: THAT

MAX A. STEARNS, A. J. VAUGHT, J. HIERONIMUS, JOHN BEMAS and JOHN DOE

[3]

hereinafter called the defendants, heretofore, to wit, on or about *on or about* the 13th day of December, 1924, at 252 Spear Street, in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there wilfully and unlawfully have in their possession certain property designed for the manufacture of liquor, to wit:

5000 gallon fermenting tanks;

5000 gallon beer boiler;

2 500-gallon vats;

2 flat fermenting vats, capacity about 5000 gallons each;

Bottling machinery;

Pasturizer;

Bottle-washing machinery and machinery of all kinds used in the manufacture of beer.

25 sacks sugar,

then and there intended for use in violating Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act, in the manufacture of intoxicating liquor containing one-half of one per cent and more of alcohol by volume which

was then and there fit for use for beverage purposes.

That the possession of the said property by the said defendant was then and there prohibited, unlawful and in violation of Section 25 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided. [4]

SECOND COUNT.

And informant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath, and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof;

NOW THEREFORE, your informant presents: THAT

MAX A. STEARNS, A. J. VAUGHT, J. HIERONIMUS, JOHN BEMAS and JOHN DOE

hereinafter called the defendants, heretofore, to wit, on or about the 13th day of December, 1924, at 252 Spear Street, in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there wilfully and unlawfully maintain a common nuisance in that the said defendants did

then and there wilfully, knowingly and unlawfully manufacture on the premises aforesaid, certain intoxicating liquor, to wit:

about 5000 cases of beer with about 48 bottles to the case,

then and there containing one-half of one per cent or more of alcohol by volume and fit for use for beverage purposes;

That the maintenance of said nuisance in the manufacture of said intoxicating liquor at the time and place aforesaid by the said defendants was then and there prohibited, unlawful and in violation of Section 21 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act. [5]

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

THIRD COUNT.

And informant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW, THEREFORE, your informant presents: THAT

MAX A. STEARNS, A. J. VAUGHT, J. HIERONIMUS, JOHN BEMAS and JOHN DOE hereinafter called the defendants, heretofore, to wit, on or about the 13th day of December, 1924, at 252 Spear Street, in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there wilfully and unlawfully manufacture certain intoxicating liquor, to wit:

about 5000 cases of beer with about 48 bottles to the case,

then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the manufacture of the said intoxicating liquor by the said defendants at the time and place aforesaid [6] was then and there prohibited, unlawful and in violation of Section 3, of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

FOURTH COUNT.

And informant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a

special affidavit made under oath and that this information is based upon said affidavit, which said affidavit, is hereto attached and made a part hereof.

NOW, THEREFORE, your informant presents: THAT

MAX A. STEARNS, A. J. VAUGHT, J. HIERONIMUS, JOHN BEMAS and JOHN DOE,

hereinafter called the defendants, heretofore, to wit, on or about the 13th day of December, 1924, at 252 Spear Street, in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there wilfully and unlawfully possess certain intoxicating liquor, to wit:

about 5000 cases of beer with about 48 bottles to the case

then and there containing one-half of one per cent or more of [7] alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the

statute of the said United States of America in such case made and provided.

STERLING CARR,
United States Attorney.
KENNETH C. GILLIS,
Special Asst. to the United States Attorney.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Henry Toft, being first duly sworn deposes and says: Max A. Stearns, A. J. Vaught, J. Hieronimus, John Bemas and John Doe on or about the 13th day of December, 1924, at 252 Spear Street, in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, did then and there wilfully and unlawfully have in their possession certain property designed for the manufacture of intoxicating liquor, to wit: [8]

5000 gal. fermenting tanks;
5000 gal. beer boiler;
2 500-gal. vats;
2 flat fermenting vats, capacity about 5000 gal. each;
Bottling machinery;
Pasteurizer;
Bottle-washing machinery and machinery of all kinds used in the manufacture of beer, and
25 sacks of sugar,

then and there intended for use in violating Title II of the Act of October 28, 1919, to wit, the Na-

tional Prohibition Act, in the manufacture of intoxicating liquor containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said property by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 25 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

And affiant on his oath aforesaid further deposes and says: THAT

MAX A. STEARNS, A. J. VAUGHT, J. HIERONIMUS, JOHN BEMAS and JOHN DOE,

on or about the 13th day of December, 1924, at 252 Spear Street, in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, did then and there wilfully and unlawfully maintain a common nuisance in that the said defendants did then and there wilfully, knowingly and unlawfully manufacture on the premises aforesaid, certain intoxicating liquor, to wit:

about 5000 cases of beer with about 48 bottles to the case

then and there containing one-half of one per cent or more of [9] alcohol by volume and fit for use for beverage purposes;

That the maintenance of said nuisance in the manufacture of said intoxicating liquor at the time and place aforesaid by the said defendant was then and there prohibited, unlawful and in viola-

tion of Section 21 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

And affiant on his oath aforesaid further deposes and says: THAT

MAX A. STEARNS, A. J. VAUGHT, J. HIERONIMUS, JOHN BEMAS and JOHN DOE,

on or about the 13th day of December, 1924, at 252 Spear Street, in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, did then and there wilfully and unlawfully manufacture certain intoxicating liquor, to wit:

about 5000 cases of beer with about 48 bottles to the case,

then and there containing one-half of one per cent and more of alcohol by volume which was then and there fit for use for beverage purposes.

That the manufacture of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

And affiant on his oath aforesaid deposes and says: THAT [10]

MAX A. STEARNS, A. J. VAUGHT, J. HIERONIMUS, JOHN BEMAS and JOHN DOE,

on or about the 13th day of December, 1924, at 252 Spear Street, in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this

Court, did then and there wilfully and unlawfully possess certain intoxicating liquor, to wit:

about 5000 cases of beer with about 48 bottles to the case,

then and there containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

HENRY TOFT.

Subscribed and sworn to before me this 17th day of December, 1924.

[Seal] C. M. TAYLOR,

Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Dec. 23, 1924. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [11]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 29th day of December, in the year of our Lord one thousand nine hundred and twenty-four. Present: the Honorable JOHN S. PARTRIDGE, District Judge.

No. 16,120.

UNITED STATES OF AMERICA

vs.

A. J. VAUGHT, MAX A. STEARNS, J. HIERONIMUS, JOHN BEMAS and JOHN DOE.

MINUTES OF COURT—DECEMBER 29, 1924—(ARRAIGNMENT AND PLEA).

Defendants A. J. Vaught, J. Hieronimus and John Bemas were present with attorney, duly arraigned and each of said defendants plead "Not Guilty" to information filed herein. Order trial set for Dec. 30, 1924.

Page 386, Vol. 64. [12]

In the Southern Division of the United States District Court for the Northern District of California.

No. 16,120.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. J. VAUGHT et al.,

Defendants.

PETITION TO EXCLUDE EVIDENCE.

The petition of A. J. Vaught, one of the defendants in the above-entitled action, respectfully represents and shows:

I.

That petitioner now is and has been since on or about the 1st day of November, 1924, in the possession and control and the lessee and tenant of that certain one-story building having a mezzanine floor on a portion thereof, at 252 Spear Street, between Howard and Folsom Streets, in the city and county of San Francisco, State of California, the interior of which premises is shown upon the drawing hereunto annexed and by this reference made a part hereof and marked Exhibit "A."

II.

That at all times herein mentioned Samuel F. Rutter was, and now is, the Federal Prohibition Director for the State of California.

III.

That on the 13th day of December, 1924, certain Prohibition Agents, acting under and by direction of said [13] Samuel F. Rutter, said Federal Prohibition Director, visited the above mentioned and described premises, searched the same and found and seized therein, and took into their possession and under their control certain bottling machinery and other property as described in the information on file in the above-entitled action, and to which reference is hereby made, together with about five hundred (500) cases EACH containing forty-eight (48) bottles full of a liquor alleged by said Prohibition Agents to be an intoxicating liquor, to wit: beer, containing one-half of one per cent and more of alcohol by volume, and certain bills and statements relating to merchandise and particularly to malt syrup all of which were the property of petitioner.

IV.

That said search of said defendant's said premises as aforesaid was unlawful, unreasonable and in violation of your petitioner's rights under the fourth and fifth amendments to the Constitution of the United States of America, and of the National Prohibition Act and of the Act supplemental thereto, and without said officers seeing or detecting in any manner any violation of law in their presence or in the presence of any of them, and without proper or any warrant for the arrest of your petitioner or anyone upon said premises and without any reasonable or any ground to believe

that crime or offense had been, was being, or was to be, committed by anyone in or upon said premises.

V.

That at the time of said search said Prohibition Agents allege and claim to have found about five hundred (500) cases each containing about forty-eight (48) bottles of beer which said Prohibition Agents allege contains *one* [14] one-half of one per cent and more of alcohol by volume.

VI.

That your petitioner is informed and believes and therefore alleges that said Federal Prohibition Director, Samuel F. Rutter, and the United States Attorney for the Northern District of California, intend to use said property as evidence against your petitioner in the above-entitled action.

Attached affidavits marked Exhibits "B," "C," and "D," respectively, are hereby referred to and made a part hereof.

VII.

That the use of said property or any part thereof in the action against your petitioner would be in violation of your petitioner's rights under the fourth and fifth amendments to the Constitution of the United States of America.

WHEREFORE, your petitioner prays that an order of this Court be made restraining and prohibiting said Samuel F. Rutter, said Federal Prohibition Director, and the said United States Attorney for the Northern District of California from using or allowing to be used said property against

your petitioner and that this property be excluded from evidence in this action.

AFFIDAVIT OF A. J. VAUGHT.

A. J. Vaught, being duly sworn deposes and says: That he is one of the defendants in the above-entitled action; that he has read the foregoing petition to exclude evidence and knows the contents thereof, that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters [15] that he believes it to be true.

A. J. VAUGHT.

Subscribed and sworn to before me this 21st day of January, A. D. 1925.

[Seal] MARIE FOREMAN,
Notary Public. [16]

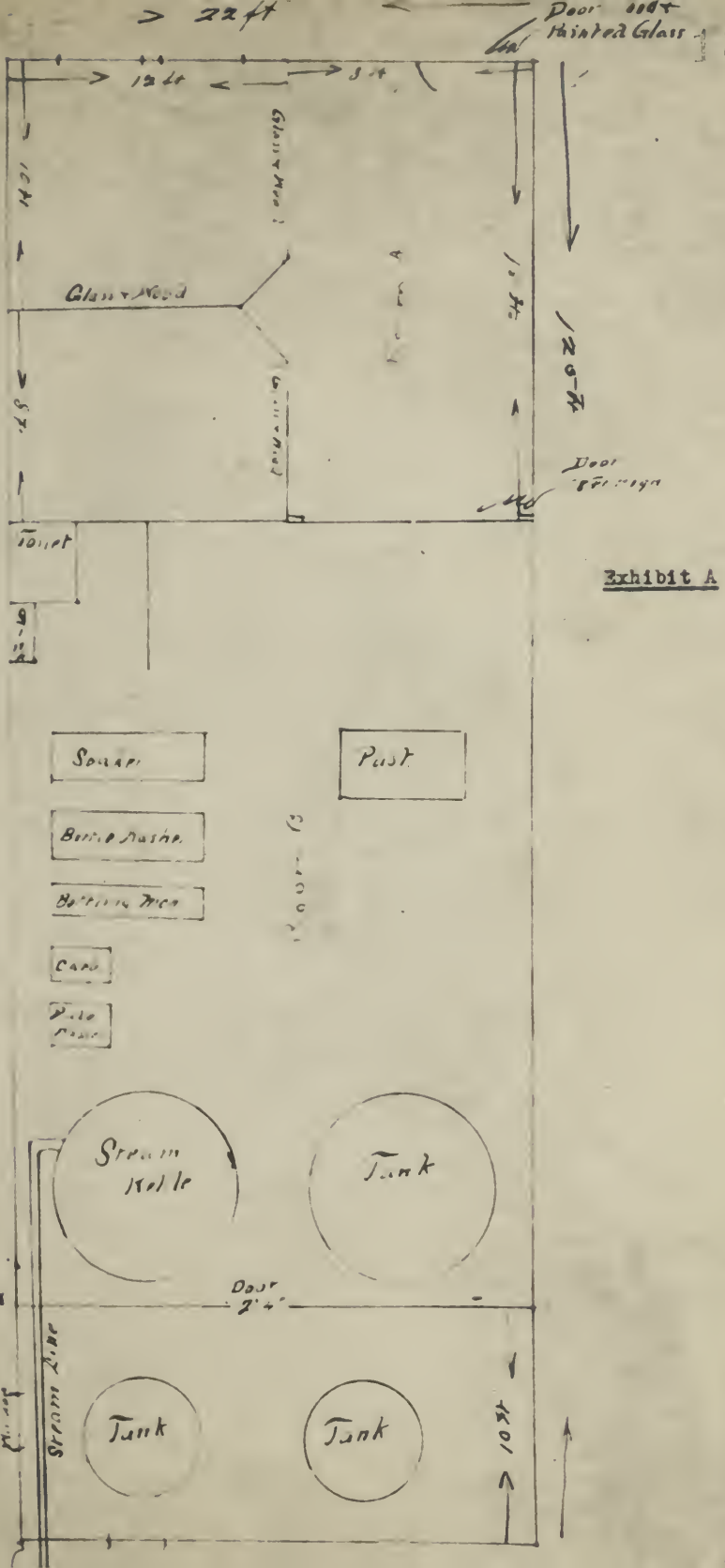
> 22ft
Door Solid Tinted Glass
> 12ft <
3ft
Glass Wood
Glass Wood
Door
Toilet
Exhibit A
Square
Post
Bottle Racks
Bottling Area
Cage
Table
Stream Kettle
Tank
Door 2'4"
Stream Line
Tank
Tank
10ft

EXHIBIT "B."

In the Southern Division of the United States District Court for the Northern District of California.

No. 16,120.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. J. VAUGHT et al.,

Defendants.

AFFIDAVIT OF JOHN BEAMISH.

Northern District of California,
City and County of San Francisco,—ss.

John Beamish, being first duly sworn, deposes and says:

My name is John Beamish and I am informed against herein as John Beamas. I am acquainted with the premises known as 252 Spear Street, situate on the Westerly side of said Street between Howard and Folsom Streets, in the City and County of San Francisco. I have seen the diagram of the first floor of the building located on said premises which is hereto attached and marked "Exhibit A" and by this reference made a part hereof.

On or about the 1st day of November, 1924, I was [18] employed by A. J. Vaught as a laborer and worked continuously as a laborer on the said premises from that date until Saturday, December 13,

1924, when I was arrested by certain Prohibition Agents. I do not know the exact names of these agents but I am informed and believe and therefore state that two of them were Agents Powers and Toft; that the front of said building is of wood and brick construction and has certain windows and a door; the windows are and were painted with white paint at all times while I worked there, to and including the 13th day of December, 1924, and it was impossible for anyone to see through said windows or door, or obtain through said windows or door a view of the inside of said building; that the sides and back of said building were constructed of galvanized iron; that the sides of said building did not have any windows except that there was a small window in the Westerly part of the Northerly side of said building and to the West of a partition located in the rear of said building; the glass of this window was painted with white paint and no one could see inside said building through said window; that the rear of said building was also of galvanized iron construction and had no windows but contained an opening made of galvanized iron which led to an adjoining building; that the rear ten feet of said building was partitioned off from said front portion of said building by a galvanized iron partition and was not used at all at any time during the time I was there; that there was no office in said building nor was anyone, with the exception of said agents and those employed therein, ever in said building, nor

was anyone ever invited into the building during such time.

That at all times herein mentioned and particularly [19] on the 13th day of December, 1924, the front door to said building was locked and latched; that on the 13th day of December, 1924, at about the hour of noon I heard a knock on said door and released the latch and certain persons who were standing on the outside of said building and whom I afterwards learned were prohibition Agents pushed the door open and came in and rushed past me into room "A" and rushed through room "A" into room "B" as such rooms are set forth in "Exhibit A"; that at all times between November 1, 1924, and December 13, 1924, there have been wooden folding doors between said Room "A" and Room "B"; that at the time said Prohibition Agents rushed through Room "A" into Room "B" these doors were closed with the exception that the Northerly door was slightly ajar. I did not open the door leading from Room "A" into Room "B" for said Agents. Immediately after the Prohibition Agents entered from the Street, and before they went from Room "A" to Room "B," they told me to stand where I was and told me they were Federal Officers, one of them showing me his badge. I remained there and later on went into Room "B" and continued my work of sweeping and cleaning up; that at no time did I invite any of these agents into the said premises or into Room "B" or any part of said premises at 252 Spear Street; that it was impossible for anyone in the street to see

into the said premises; that at, and sometime before the entry of said Agents as aforesaid, tanks and other containers had been washed and thoroughly cleaned and there was no odor of any kind which is incident to, or results from, the manufacture of beer which could by any possibility have escaped from or appeared upon the outside of said building; that at the time of said entry of said [20] Agents as aforesaid, tanks and other containers had been washed and thoroughly cleaned and there was no odor of any kind which is incident to, or results from, the manufacture of beer which could by any possibility have escaped from or appeared upon the outside of said building; that at the time of said entry of said Agents said Vaught was not in said premises and did not return to said premises until about one half of an hour after such entry; while said Vaught was absent from said building as aforesaid, I was in charge of said premises or consented to their coming in. No machinery was in operation on said premises except a pasteurizing machine since the 11th day of December, 1924.

JOHN BEAMISH.

Subscribed and sworn to before me this 21st day of January, 1925.

[Seal] MARIE FORMAN,

Notary Public in and for the City and County of San Francisco, State of California. [21]

EXHIBIT "C."

In the Southern Division of the United States District Court for the Northern District of California.

No. 16,120.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. J. VAUGHT et al.,

Defendants.

AFFIDAVIT OF A. J. VAUGHT.

Northern District of California,
City and County of San Francisco,—ss.

A. J. Vaught, being first duly sworn, deposes and says:

My name is A. J. Vaught; that I am acquainted with the premises at 252 Spear Street situate between Howard and Folsom Streets in the City and County of San Francisco. The premises are a one-story building having a mezzanine floor on a portion thereof; that I became acquainted with said building on or about the 1st day of November, 1924, and at that time I took possession and control of said premises until the hour of noon or thereabouts on December 13, 1924; that the annexed drawing marked "Exhibit A" and by this reference made a part hereof was prepared in accordance with the interior of said ground floor and that I have examined the same and that it is a cor-

rect description and delineation of the interior of said ground floor generally; that at no time was the public, or persons other than my employees, invited into said premises by me or anyone working for me, nor were the public, or persons other than my employees, [22] permitted to enter said premises during said time and that no persons entered said building after the 15th day of November, 1924, except those who were employed therein and the Prohibition Agents who entered said building in the manner mentioned in the affidavit of John Beamish hereto attached; that said Beamish entered my employ on or about the first day of November, 1924, and continued in my employ until the 13th day of December, 1924; that at all times herein mentioned Room "A" as described on said drawing, was empty, and Room "B" contained certain tanks, kettles, bottling machines and other machinery; that Room "B" had at its rear a galvanized iron partition running across said building from North to South, and at a uniform distance of about ten (10) feet from the rear of said building; that there was no window to the street in any part of Room "B" nor was there anything which was situated in Room "B" which could be seen from the outside of said building; that there was an opening of two feet six inches in said partition; that the door indicated on said map between Room "A" and Room "B" was a wooden front door and was usually closed; that the front door of said building was constructed as follows: The lower half was wood and the upper half was glass painted

with white paint, through which no one could see. All of the windows of said structure were painted with white paint as well as the upper portion of said front door and through which no one could see; that I arrived at the said premises at about the hour of noon and let myself in through the front door by operating the latch, which operation was known only to me and to my employees; that at the time I arrived there were certain Prohibition Agents in the building who questioned me and who were in there without my permission or invitation and without my knowledge until after I had [23] entered the premises; that I am informed and believe and therefore allege that two of these agents were Agents Powers and Toft.

A. J. VAUGHT.

Subscribed and sworn to before me this 21st day of January, 1925.

[Seal] MARIE FORMAN,

Notary Public in and for the City and County of San Francisco State of California. [24]

EXHIBIT "D."

In the Southern Division of the United States District Court for the Northern District of California.

No. 16,120.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. J. VAUGHT et al.,

Defendants.

AFFIDAVIT OF CLIFFORD E. WENDTE.

Northern District of California,
City and County of San Francisco,—ss.

Clifford E. Wendte, being first duly sworn, deposes and says:

That for about twenty-four years continuously, and prior to July 1, 1924, he was engaged in the manufacture of beer, near-beer, malt products, cereal beverages and malt beverages and liquid and other products of all sorts and kinds containing malt; that he has been for nineteen years continuously, immediately before July 1, 1924, by profession a brewmaster and working at such profession; that he is now and has been since July 1, 1924, employed as maltser superintendent by the Charles Boch Company whose business is making malt.

That he is familiar with beer, near-beer and cereal and malt beverages and with their effect on the

senses, both in the completed state and at all stages of manufacture.

That there is no difference whatsoever in the appearance or smell of beer containing more than one half of one percent alcohol by volume, and the appearance or smell [25] of beer, or as it is otherwise called, near-beer or cereal beverage, containing less than one half of one percent of alcohol by volume, or no alcohol at all.

I am informed that the following machinery was used in the premises at 252 Spear Street on or about December 11, 1924:

A kettle for boiling the malt,
Tanks for fermentation and clarification,
A filter,
A carbonator,
A bottling machine for filling and capping,
A pasteurizing machine.

In the process of making near-beer or cereal beverages containing less than one half of one percent of alcohol by volume, such machinery is necessary. In the making of near-beer or cereal beverage a pasteurizing machine is necessary.

The same machinery which was used in many of the breweries situated in San Francisco prior to the enactment of the National Prohibition Act, in making beer containing more than one half of one percent of alcohol by volume, is still used in making near-beer or cereal beverages containing less than one half of one percent of alcohol by volume.

C. E. WENDTE.

Subscribed and sworn to before me this 21st day of January, 1925.

[Seal] MARIE FORMAN,
Notary Public in and for the City and County of San Francisco, State of California. [26]

Due service and receipt of a copy of the within motion and affidavits is hereby admitted this 21st day of January, 1925.

STERLING CARR,
U. S. Atty.
KENNETH C. GILLIS,
Asst. U. S. Atty.

[Endorsed]: Filed Jan. 23, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [27]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Friday, the 23d day of January, in the year of our Lord one thousand nine hundred and twenty-five. Present: the Honorable JOHN S. PARTRIDGE, District Judge.

No. 16,120.

UNITED STATES OF AMERICA
vs.
A. J. VAUGHT, MAX A. STEARNS, J. HIERONIMUS, JOHN BEMAS & JOHN DOE.

MINUTES OF COURT—JANUARY 23, 1925—TRIAL.

In this case John T. Williams, Esq., attorney herein, presented and filed Petition to exclude evidence. After hearing Mr. Williams, K. C. Gillis, Esq., Asst. U. S. Atty., and agent E. Powers, ordered petition denied and to which order an exception was entered.

This case came on regularly for trial. Defendants A. J. Vaught, John Bemas and J. Hieronimus were present with Attorneys, John T. Williams, and J. Fred McDonald, Esqs. Mr. Gillis was present for and on behalf of United States. Upon calling of case, all parties answering ready for trial, Court ordered same proceed and that jury-box be filled from regular panel of trial jurors of this court. Accordingly, the hereinafter named persons, having been duly drawn by lot, sworn, examined and accepted, were duly sworn as jurors to try issues herein, viz.: [28]

Reinhold L. Anderson,	Lloyd A. Wallace,
W. Van Zandt,	Wm. B. Curtis,
Samuel Breck,	Thos. R. Edwards,
F. H. Daniels,	H. A. Weichhart,
E. M. Shaw,	Wm. F. Cordes,
Robt. S. Atkins,	Wm. L. Culver.

Court ordered further trial continued to Jan. 26, 1925 at 10:30 A. M.

Page 474, Vol. 64. [29]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 26th day of January, in the year of our Lord one thousand nine hundred and twenty-five. Present: the Honorable JOHN S. PARTRIDGE, District Judge.

No. 16,120.

UNITED STATES OF AMERICA

vs.

A. J. VAUGHT, MAX A. STEARNS, J. HEIRONIMUS, JOHN BEMAS & JOHN DOE.

MINUTES OF COURT—JANUARY 26, 1925—TRIAL (CONTINUED).

This case came on regularly this day for trial of defendants A. J. Vaught, John Bemas and J. Hieronimus upon Information filed herein. Said defendants were present with Attorneys, John T. Williams, Jas. R. Kelly and J. Fred McDonald, Esqs. K. C. Gillis, Esq., Asst. U. S. Atty., was present for and on behalf of United States. The jury heretofore impaneled and sworn to try defendants was present and complete.

On motion of Mr. Williams, ORDERED that all persons to be called as witnesses herein (except as to A. R. Shurtleff) be excluded from courtroom during introduction of evidence.

Mr. Williams made a motion for order excluding certain evidence, which motion the Court ORDERED denied and to which order an exception was entered.

Mr. Gillis called certain persons as witnesses on [30] behalf of United States, each of whom was duly sworn and examined, to wit: Edward Powers, A. R. Shurtleff, E. T. Tway, George B. Leroy, John Lankanue, R. P. Merillion, Dennis Doherty, Frank X. Mettimann, C. H. Kornbeck and R. Busk, and introduced in evidence on behalf of United States certain exhibits which were filed and marked U. S. Exhibits Nos. 2, 3, 4, 5, 6, 7, 8 and 9, and presented another exhibit on behalf of the United States for identification, which was filed and marked U. S. Exhibit No. 1 for Identfication; and rested case of United States.

Thereupon Mr. Williams moved the Court for order instructing jury to return verdict of not guilty as to each defendant, which motion the Court ordered denied and to which order an exception was entered. Mr. Williams then called certain witnesses on behalf of defendants, each of whom was duly sworn and examined, to wit: John J. Lehrmann, J. A. Hieronimus (defendant), John A. Harbour and John McCallam.

Hour of adjournment having arrived, the Court ordered further trial continued to Jan. 27, 1925, at 10:30 A. M.

Page 482, Vol. 64. [31]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the court-room thereof, in the city and county of San Francisco, on Tuesday, the 27th day of January, in the year of our Lord one thousand nine hundred and twenty-five. Present: the Honorable JOHN S. PARTRIDGE, District Judge.

No. 16,120.

UNITED STATES OF AMERICA

vs.

A. J. VAUGHT, MAX A. STEARNS, HIERONIMUS, JOHN BEMAS & JOHN DOE.

MINUTES OF COURT—JANUARY 27, 1925—TRIAL (CONTINUED).

This case came on regularly this day for further trial as to defendant A. J. Vaught, John Bemas and J. Hieronimus. Said defendants were present with Attorneys John T. Williams, Jas. R. Kelly and J. Fred McDonald, Esqs. K. C. Gillis, Esq., Asst. U. S. Atty., was present for and on behalf of United States. Jury heretofore impaneled and sworn to try defendants was present and complete.

Mr. Williams called Richard D. Quinlan as a witness on behalf of defendants, who was duly sworn and examined, and then recalled defendant J. A.

Hieronimus, who was further examined; and case was rested on behalf of defendants.

Case was then argued by Mr. Gillis, Mr. McDonald and Mr. Williams and submitted, whereupon the Court proceeded to instruct the jury, who, after being so instructed, retired at 2:50 P. M., and to deliberate upon a verdict, and subsequently returned into court at 3:20 P. M., and upon [32] being called all twelve (12) Jurors answered to their names and were found to be present in court, and, in answer to question of the Court, stated they had agreed upon a verdict and presented a written verdict, which the Court ordered filed and recorded, viz:

> "We, the Jury, find as to the defendants at the bar as follows—A. J. Vaught, Guilty all four—J. Hieronimus, Not Guilty—John Bemas, Not Guilty.
>
> W. F. CORDES,
> Foreman."

Ordered jurors discharged from further consideration of case and from attendance upon Court until Jan. 28, 1925, at 10 A. M.

Ordered that defendants J. Hieronimus and John Bemas be discharged and go hence without day, and that the bonds heretofore given for their appearance herein be and same are hereby exonerated.

Defendant A. J. Vaught was called for judgment. Mr. McDonald moved Court for order for new trial, which motion the Court ordered denied and to which order an exception was entered. Mr. McDonald then made a Motion in Arrest of Judgment, which motion the Court likewise ordered denied and to which order

an exception was entered. ORDERED that defendant, A. J. Vaught, for offense of which he stands convicted, be imprisoned for 1 year in San Francisco County Jail and pay fine of $1,000.00 or in default thereof, defendant be further imprisoned until said fine is paid or he be otherwise discharged by due process of law; as detailed in judgment-book. Ordered that defendant stand committed to U. S. Marshal to execute said judgment, and that a commitment issue.

Page 487, Vol. 64. [33]

In the Southern Division of the United States District Court for the Northern District of California.

No. 16,120.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MAX A. STEARNS, A. J. VAUGHT, J. HIERONIMUS, JOHN BEMAS, and JOHN DOE,

Defendants.

DEFENDANTS' PROPOSED INSTRUCTIONS TO JURY OFFERED BY DEFENDANTS AND EACH OF THEM.

[34]

INSTRUCTION No. I.

I direct you to return a verdict of not guilty as to defendant Beamish, upon the ground that there is

not sufficient evidence to warrant a submission to the jury. [35]

INSTRUCTION No. II.

I direct you to return a verdict of not guilty as to defendant Hieronimus, upon the ground that there is not sufficient evidence to warrant a submission to the jury. [36]

INSTRUCTION No. III.

I instruct you that it is your duty to acquit the defendant, Beamish, if you find that he had no knowledge that beer containing one-half of one per cent or more of alcohol by volume was, or was to be, manufactured or possessed at No. 252 Spear Street, even though you should find that he had cause to suspect that beer containing one-half of one per cent or more of alcohol by volume was, or was to be, manufactured or possessed at said premises. [37]

INSTRUCTION IV.

I instruct you that it is your duty to acquit the defendant Hieronimus if you find that he had no knowledge that beer containing one-half of one per cent or more of alcohol by volume was, or was to be, manufactured or possessed at No. 252 Spear Street, even though you should find that he had cause to suspect or suspected that beer containing one-half of one per cent or more of alcohol by volume was, or was to be, manufactured or possessed at said premises. [38]

INSTRUCTION V.

An employer cannot be held responsible for the acts of his employee or servant unless he authorizes or participates in the same.

(Instruction by Judge Dooling in Morrison case.)
[39]

INSTRUCTION VI.

It is a rule of law, of course, that no man can be found guilty on suspicion, no matter how strong that may be. But such evidence as shows his guilt beyond a reasonable doubt is sufficient to warrant a conviction. In this case, as in every other, the defendants are presumed to be innocent, and the burden of proving their guilt rests upon the Government, and if the Government has failed to overcome such presumption of innocence in this particular case, your verdict should be "not guilty." The presumption of innocence attaches at the beginning of the trial and remains with the defendants and each of them, throughout the trial and until by your verdict, you have otherwise determined, if you should so determine unless you are satisfied from the evidence, of the guilt of such defendant beyond a reasonable doubt. A reasonable doubt is defined to be that state of the case which, after an entire comparison and consideration of all the evidence, leaves the minds of the jury in that condition that they cannot say that they have an abiding conviction, to a moral certainty, of the truth of the charge. It is, in fact, such doubt as a reasonable man may honestly entertain after a fair consideration of all the evidence. If you have such reasonable doubt as to the guilt of the defendants, or either of them, it is your duty to give such defendant the benefit of that doubt. If you have no such reasonable doubt of the guilt of

the defendants, or either of them, it is equally your duty to convict.

(Instruction of Judge Dooling in U. S. vs. Morrison.) [40]

INSTRUCTION VII.

I instruct you that the evidence obtained at 252 Spear Street was obtained unlawfully and in violation of the Constitutional rights of the defendant Vaught, and I instruct you to acquit the defendant Vaught. [41]

INSTRUCTION VIII.

Where the alleged possession or manufacture of liquor or possession of machinery with intent to manufacture liquor is in violation of the law, there is a presumption that the defendants did not possess, manufacture or intend to manufacture liquor. This is the usual presumption of innocence, and the Government must prove the manufacture, possession and or intent to manufacture, beyond a reasonable doubt.

(Paraphrase of instruction by Judge Dooling in U. S. vs. Morrison.) [42]

INSTRUCTION IX.

You are instructed, Gentlemen, that if the evidence in this case admits of two constructions, one the guilt of these defendants and the other their innocence, you are bound under the law and by your oaths to acquit, giving them the benefit of any reasonable doubt. Therefore if the evidence in this case admits of the construction that the defendant Hieronimus was dealing as a broker or jobber and had no other interest in this business at 252 Spear

Street, then it is your duty to acquit the defendant Hieronimus. [43]

INSTRUCTION X.

You are instructed, Gentlemen, that if the evidence in this case admits of two constructions, one the guilt of these defendants and the other their innocence, you are bound under the law and by your oaths to acquit, giving them the benefit of any reasonable doubt. Therefore if the evidence in this case admits of the construction that the defendant Beamish was working as a laborer and had no other interest in this business at 252 Spear Street, then it is your duty to acquit the defendant Beamish. [44]

INSTRUCTION XI.

The mere fact, if it be a fact, that the defendant Vaught was lessee of the premises at 252 Spear Street and or in control thereof, if not sufficient to convict him, if he did not know that beer containing one-half of one per cent or more of alcohol by volume was, or was to be, manufactured or possessed there, and aid and abet its manufacture or possession. [45]

INSTRUCTION XII.

Mere knowledge of the manufacture or possession of intoxicating liquor is not sufficient without participation therein. Such participation by aiding, abetting, counselling, commanding, inducing or procuring such manufacture or possession is necessary for conviction.

(Paraphrase of instruction by Judge Dooling in U. S. vs. Morrison, No. 9720, in this Court.) [46]

INSTRUCTION XIII.

If you find that the defendant, Hieronimus, may have thought that others were making or possessing intoxicating liquor at 252 Spear Street, but had no interest save as a jobber or broker, selling them goods, you must acquit him. [47]

INSTRUCTION XIV.

If you find that the defendant, Beamish, may have thought that others were making or possessing intoxicating liquor at 252 Spear Street, but had no interest save as a laborer for hire, you must acquit him.

[Endorsed]: Filed Jan. 27, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [48]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,120.

THE UNITED STATES OF AMERICA

vs.

A. J. VAUGHT et al.

VERDICT.

We, the Jury, find as to the defendants at the bar as follows:

A. J. Vaught—Guilty all four;

J. Hieronimus—Not Guilty;

John Bemas—Not Guilty.

H. F. CORDES,
Foreman.

[Endorsed]: Filed Jan. 27, 1925. At 3 o'clock and 20 minutes P. M. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [49]

In the Southern Division of the United States District Court for the Northern District of California.

No. 16,120.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MAX A. STEARNS, A. J. VAUGHT, J. HIERONIMUS, JOHN BEMAS and JOHN DOE.

MOTION FOR ORDER VACATING VERDICT OF JURY AND GRANTING NEW TRIAL.

The defendants, A. J. Vaught, J. Hieronimus and John Bemas, in the above-entitled action do hereby move this Honorable Court for an order vacating the verdict of the jury herein and granting to these defendants and each of them a new trial for the following causes, and each of them materially effecting the Constitutional rights of these defendants and each of them, to wit:

I.

Said verdict is contrary to the evidence adduced upon the trial hereof.

II.

The evidence adduced at said trial is insufficient to justify said verdict.

III.

Said verdict is contrary to law.

IV.

The Court erred in its instruction to the jury and in deciding questions of law during the course of the trial hereof, which errors were duly excepted to. [50]

V.

That the Court erred in denying the motion of Defendant Vaught to exclude certain evidence, which error was duly excepted to.

VI.

That the Court erred in admitting, in the course of the trial, incompetent, irrelevant and immaterial evidence on various occasions, which errors were duly excepted to.

This motion is made upon the minutes of the court, and upon the said motion to exclude evidence and the affidavits attached thereto and upon the testimony and evidence introduced at the trial.

Dated: January 27, 1925.

WILLIAMS, KELLY and McDONALD,
Attorneys for Defendants.

[Endorsed]: Filed Jan. 27, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [51]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,120.

Conv. Viol. National Prohibition Act.

THE UNITED STATES OF AMERICA

vs.

A. J. VAUGHT.

JUDGMENT ON VERDICT OF GUILTY.

Kenneth C. Gillis, Esq., Assistant United States Attorney, and the defendant with his counsel came into court. The defendant was duly informed by the Court of the nature of the information filed on the 23d day of December, 1924, charging him with the crime of violating National Prohibition Act; of his arraignment and plea of Not Guilty; of his trial and the verdict of the jury on the 27th day of January, 1925, to wit:

"We, the Jury find as to the defendants at the bar as follows:

A. J. Vaught—Guilty all four;

J. Hieronimus—Not Guilty;

John Bemas—Not Guilty.

W. F. CORDES,
Foreman."

The defendant was then asked if he had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied

a motion for new trial and a motion in arrest of judgment; thereupon the Court rendered its judgment; THAT, WHEREAS, the said A. J. Vaught, having been duly convicted in this Court of the crime of violating [52] National Prohibition Act;

IT IS THEREFORE ORDERED AND ADJUDGED that the said A. J. Vaught be imprisoned for the period of one (1) year in the County Jail, county of San Francisco, California, and pay a fine in the sum of One Thousand ($1,000.00) Dollars; further ordered that in default of the payment of said fine that said defendant be imprisoned until said fine be paid or until he be otherwise discharged in due course of law.

Judgment entered this 27th day of January, A. D. 1925.

WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk.

Entered in Vol. 18, Judg. and Decrees, at page 88. [53]

In the Southern Division of the United States District Court for the Northern District of California.

No. 16,120.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MAX A. STEARNS, A. J. VAUGHT, J. HIERONIMUS, JOHN BEMAS, and JOHN DOE,

Defendants.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that in the above-entitled cause the defendant, A. J. Vaught, on January 21, 1925, duly served, and on J .uary 23, 1925, duly filed and presented to the Court therein a verified petition, with exhibits consisting of a drawing and of the affidavits of John Beamish, of said A. J. Vaught and of Clifford E. Wendte annexed thereto and made a part thereof, of which petition and exhibits the following is a true copy with the endorsements thereon: [54]

In the Southern Division of the United States District Court for the Northern District of California.

No. 16,120.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. J. VAUGHT et al.,

Defendants.

PETITION TO EXCLUDE EVIDENCE.

The petition of A. J. Vaught, one of the defendants in the above-entitled action, respectfully represents and shows:

I.

That petitioner now is and has been since on or about the 1st day of November, 1924, in the possession and control and the lessee and tenant of that certain one-story building having a mezzanine floor on a portion thereof, at 252 Spear Street between Howard and Folsom Streets, in the city and county of San Francisco, State of California, the interior of which premises is shown upon the drawing hereunto annexed and by this reference made a part hereof and marked Exhibit "A."

II.

That at all times herein mentioned Samuel F. Rutter was, and now is, the Federal Prohibition Director for the State of California.

III.

That on the 13th day of December, 1924, certain Prohibition Agents, acting under and by direction of said Samuel F. Rutter, said Federal Prohibition Director, visited the above mentioned and described premises, searched the same and found and seized therein and took into their possession and under their control certain bottling machinery and other property as described in the information on file in the above-entitled action, and to which reference is [55] hereby made, together with about five hundred (500) cases each containing forty-eight (48) bottles full of a liquor alleged by said Prohibition Agents to be an intoxicating liquor, to wit: beer, containing one-half of one per cent and more of alcohol by volume, and certain bills and statements relating to merchandise and particularly to malt syrup, all of which were the property of petitioner.

IV.

That said search of said defendants' said premises as aforesaid was unlawful, unreasonable and in violation of your petitioner's rights under the fourth and fifth amendments to the Constitution of the United States of America, and of the National Prohibition Act and of the Act supplemental thereto, and without said officers seeing or detecting in any manner any violation of law in their presence or in the presence of any of them, and without proper or any warrant for the arrest of your petitioner or anyone upon said premises and without any reasonable or any ground to believe that crime or offense

had been, was being, or was to be, committed by anyone in or upon said premises.

V.

That at the time of said search said Prohibition Agents allege and claim to have found about five hundred (500) cases containing about forty-eight (48) bottles of beer which said Prohibition Agents allege contains one-half of one per cent and more of alcohol by volume.

VI.

That your petitioner is informed and believes and therefore alleges that said Federal Prohibition Director, Samuel F. Rutter, and the United States Attorney for the Northern District of California, intend to use said property as evidence against your petitioner in the above-entitled action.

Attached affidavits marked exhibits "B," "C," and "D," respectively, are hereby referred to and made a part hereof. [56]

VII.

That the use of said property or any part thereof in the action against your petitioner would be in violation of your petitioner's rights under the fourth and fifth amendments to the Constitution of the United States of America.

Wherefore, your petitioner prays that an order of this Court be made restraining and prohibiting said Samuel F. Rutter, said Federal Prohibition Director, and the said United States Attorney for the Northern District of California, from using or allowing to be used said property against your

petitioner and that this property be excluded from evidence in this action.

A. J. VAUGHT.

A. J. Vaught, being duly sworn deposes and says: That he is one of the defendants in the above-entitled action; that he has read the foregoing petition to exclude evidence and knows the contents thereof, that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

A. J. VAUGHT.

Subscribed and sworn to before me this 21st day of January, A. D. 1925.

MARIE FORMAN,
Notary Public. [57]

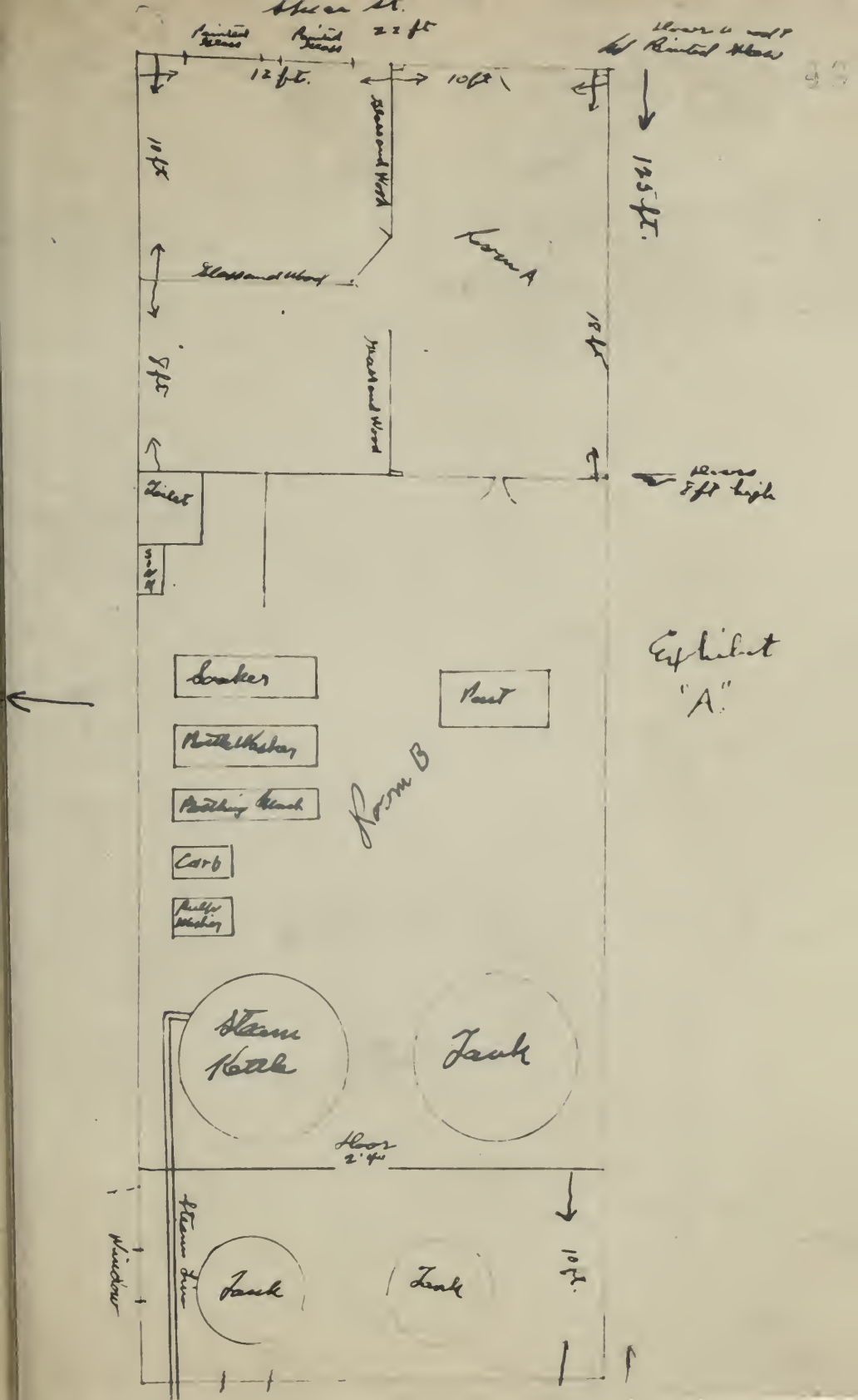
Stone St.
22 ft
Painted Stone
Painted Stone
12 ft.
10 ft
Stone and Wood
10 ft
Stone and Wood
Room A
125 ft.
8 ft
Stone and Wood
18 ft
Toilet
Stone 8 ft high
Exhibit "A"
Soaker
Pant
Kettle Washer
Rolling Bench
Room B
Carb
Pulley Washer
Steam Kettle
Tank
Floor 2' 4"
Steam Line
Window
Tank
Tank
10 ft.

EXHIBIT "B."

In the Southern Division of the United States District Court for the Northern District of California.

No. 16,120.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. J. VAUGHT et al.,

Defendants.

AFFIDAVIT OF JOHN BEAMISH.

Northern District of California,
City and County of San Francisco,—ss.

John Beamish, being first duly sworn, deposes and says:

My name is John Beamish and I am informed against herein as John Bemas, I am acquainted with the premises known as 252 Spear Street, situated on the Westerly side of said street between Howard and Folsom Streets, in the city and county of San Francisco. I have seen the diagram of the first floor of the building located on said premises which is hereto attached and marked "Exhibit A" and by this reference made a part hereof.

On or about the 1st day of November, 1924, I was employed by A. J. Vaught as a laborer and worked continuously as a laborer on the said premises from that date until Saturday, December 13, 1924, when

I was arrested by certain Prohibition Agents. I do not know the exact names of these agents but I am informed and believe and therefore state that two of them were Agents Powers and Toft; that the front of the building is of wood and brick construction and has certain windows and doors; the windows are and were painted with white paint at all times while I worked there, to and including the 13th day of December, 1924, and it was impossible for anyone to see through said windows or door, or obtain through said windows or door a view of the inside of said building; that the sides and back of said building were constructed of galvanized [59] iron; that the sides of said building did not have any windows except that there was a small window in the Westerly part of the Northerly side of said building and to the West of a partition located in the rear of said Building; the glass of this window was painted with white paint and no one could see inside said building through said window; that the rear of said building was also of galvanized iron construction and had no windows but contained an opening made of galvanized iron which let to an adjoining building; that the rear ten feet of said building was partitioned off from said front portion of said building by a galvanized iron partition and was not used at all at any time during the time I was there; that there was no office in said building nor was anyone, with the exception of said agents and those employed therein, ever in said building, nor was anyone ever invited into the building during such time.

That at all times herein mentioned and particularly on the 13th day of December, 1924, the front door to said building was locked and latched; that on the 13th day of December, 1924, at about the hour of noon I heard a knock on said door and released the latch and certain persons who were standing on the outside of said building and whom I afterwards learned were Prohibition Agents pushed the door open and came in and rushed past me into room "A" and rushed through room "A" into room "B" as such rooms are set forth in "Exhibit A"; that at all times between November 1, 1924, and December 13, 1924, there have been wooden folding doors between said Room "A" and Room "B"; that at the time said Prohibition Agents rushed through Room "A" into Room "B" those doors were closed with the exception that the Northerly door was slightly ajar. I did not open the door leading from Room "A" into Room "B" for said Agents. Immediately after the Prohibition Agents entered from the street, and before they went from Room "A" to Room "B," they told me to [60] stand where I was and told me they were Federal officers, one of them showing me his badge. I remained there and later on went into Room "B" and continued my work of sweeping and cleaning up; that at no time did I invite any of these agents into the said premises or into Room "B" or any part of said premises at 252 Spear Street; that it was impossible for anyone in the street to see into the said premises; that at, and sometime before the entry of said Agents as aforesaid, tanks and other

containers had been washed and thoroughly cleaned and there was no odor of any kind which is incident to, or results from, the manufacture of beer which could by any possibility have escaped from or appeared upon the outside of said building; that at the time of said entry of said Agents said Vaught was not in said premises and did not return to said premises until about one half of an hour after such entry; while said Vaught was absent from said building as aforesaid, I was in charge of said premises and neither I nor anyone else invited said agents into said premises or consented to their coming in. No machinery was in operation on said premises except a pasteurizinz machine since the 11th day of December, 1924.

JOHN BEAMISH.

Subscribed and sworn to before me this 21st day of January, 1925.

MARIE FORMAN,

Notary Public in and for the City and County of San Francisco, State of California. [61]

EXHIBIT "C."

In the Southern Division of the United States District Court for the Northern District of California.

No. 16,120.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. J. VAUGHT et al.,

Defendants.

AFFIDAVIT OF A. J. VAUGHT.

Northern District of California,
City and County of San Francisco,—ss.

A. J. Vaught, being first duly sworn, deposes and says:

My name is A. J. Vaught, that I am acquainted with the premises at 252 Spear Street situated between Howard and Folsom Streets in the City and County of San Francisco. The premises are a one story building having a mezzanine floor on a portion thereof; that I became acquainted with said building on or about the 1st day of November, 1924, and at that time I took possession and control of said premises until the hour of noon or thereabouts on December 13, 1924; that the annexed drawing marked "Exhibit A" and by this reference made a part hereof was prepared in accordance with the interior of said ground floor and that I have ex-

amined the same and that it is a correct description and delineation of the interior of said ground floor in general; that at no time was the public, or persons other than my employees, invited into said premises by me or anyone working for me, nor were the public, or persons other than my employees, permitted to enter said premises during said time and that no persons entered said building after the 15th day of November, 1924, except those who were employed therein and the Prohibition Agents who entered said building in the manner mentioned in the affidavit of John Beamish hereto attached; That said Beamish entered my employ *or* or about the first day of November, 1924, and continued in my employ until [62] the 13th day of December, 1924; *there* at all times herein mentioned Room "A" as described on said drawing, was empty, and Room "B" contained certain tanks, kettles, bottling machines and other machinery; that Room "B" had at its rear a galvanized iron partition running across said building from North to South, and at a uniform distance of about ten (10) feet from the rear of said building; that there was no window to the street in any other part of Room "B" nor was there anything which was situated in Room "B" which could be seen from the outside of said building; that there was an opening of two feet six inches in said partition; that the door indicated on said map between Room "A" and Room "B" was a wooden front door and was usually closed; that the front door of said building was constructed as follows: The lower half was wood and the upper half

was glass painted with white paint, through which no one could see. All of the windows of said structure were painted with white paint as well as the upper portion of the front door and through which no one could see; that I arrived at the said premises at about the hour of noon and let myself in through the front door by operating the latch, and which operation was known only to me and to my employees; that at the time I arrived there were certain Prohibition Agents in the building who questioned me and who were in there without my permission or invitation and without my knowledge until after I had entered the premises; that I am informed and believe and therefore allege that two of these agents were Agents Powers and Toft.

A. J. VAUGHT.

Subscribed and sworn to before me this 21st day of January, 1925.

MARIE FORMAN,

Notary Public in and for the City and County of San Francisco, State of California. [63]

EXHIBIT "D."

In the Southern Division of the United States District Court for the Northern District of California.

No. 16,120.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. J. VAUGHT et al.,

Defendants.

AFFIDAVIT OF CLIFFORD E. WENDTE.

Northern District of California,
City and County of San Francisco,—ss.

Clifford E. Wendt, being first duly sworn, deposes and says:

That for about twenty-four years continuously, and prior to July 1, 1924, he was engaged in the manufacture of beer, near-beer, malt products, cereal beverages and malt beverages and liquid and other products of all sorts and kinds containing malt; that he has been for nineteen years continuously, immediately before July 1, 1924, by profession a brewmaster and working at such profession; that he is now and has been since July 1, 1924, employed as maltser superintendent by the Charles Bock Company whose business is making malt.

That he is familiar with beer, near-beer and cereal and malt beverages and with their effect on

the senses, both in the completed state and at all stages of manufacture.

That there is no difference whatsoever in the appearance or smell of beer containing more than one half of one per cent of alcohol by volume, and the appearance or smell of beer, or, as it is otherwise called, near-beer or cereal beverages, containing less than one half of one per cent of alcohol by volume, or no alcohol at all.

In am informed that the following machinery was used in the premises at 252 Spear Street on or about December 11, 1924: [64]

A kettle for boiling the malt,
Tanks for fermentation and clarification,
A filter,
A carbonator,
A bottling machine for filling and capping,
A Pasteurizing machine.

In the process of making near-beer or cereal beverages containing less than one half of one per cent of alcohol by volume, such machinery is necessary.

In the making of near-beer or cereal beverages a pasteurizing machine is necessary.

The same machinery which was used in many of the breweries situated in San Francisco prior to the enactment of the National Prohibition Act, in making beer containing more than one half of one per cent of alcohol by volume, is still used in making near-beer or cereal beverages containing less than one half of one per cent of alcohol by volume.

C. E. WENDTE.

Subscribed and sworn to before me this 21st day of January, 1925.

MARIE FORMAN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed January 23, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [65]

On January 23, 1925, and immediately prior to the trial of the above-entitled case, the defendant Vaught brought on for hearing said petition, and in support thereof submitted and presented in evidence the foregoing affidavits and the other foregoing exhibit.

After hearing arguments by the attorneys for the said defendant in behalf of said motion and of the attorney for the United States against it and a statement of Edward Powers as follows:

> "Mr. Shurtleff came into the building and told us he understood that on Spear Street the men in there were transferring liquid from one barrel to another, that evidently there was some sort of an illicit brewery there and I accompanied him to the premises and I walked to the back and I could smell the odor of beer; I walked to the other side of it and a portion of the corrugated iron was loose; I stretched that and looked in and saw two men in there washing barrels. I could see numerous bottles of beer and other machinery in there and we went around to the front door and just as we

reached there they opened the door to take a package and we walked in and we seized the beer and arrested the men. I smelled the beer and I knew there was no permit for making any kind of beer at that place."

The Court denied said petition, to which ruling of the Court, the defendant, A. J. Vaught, then and there duly and regularly excepted. [66]

The said cause came on for trial on the 23d of January, 1925, Kenneth C. Gillis, Esq., Special Assistant United States Attorney appearing for the United States of America, and Williams, Kelly & McDonald, Esquires, appearing as attorneys for the defendants. The trial proceeded on said day and thereafter on January 26th and 27th. Thereafter, a jury having been impaneled and sworn to try the case, the following proceedings were had and evidence and testimony, oral and documentary and exhibits were introduced in evidence on behalf of the United States and on behalf of the defendants, and each of them, as follows:

Mr. Gillis stated that the information in the second, third and fourth counts charges the manufacture, possession and nuisance, of five thousand (5000) cases of beer and that through inadvertence it should be five hundred (500) cases and the Court ordered the information corrected accordingly.

Mr. WILLIAMS.—Now, if your Honor please, at this time I would like to renew the motion that was made in this court prior to the commencement of this trial, and ask for an order suppressing and excluding all of the evidence that was acquired or

obtained from or within the premises 252 Spear Street in the city and county of San Francisco, on behalf of all of the defendants, but particularly and peculiarly on behalf of the defendant Vaught, upon the grounds set forth in the verified petition, which was then submitted to the court, and upon the affidavits which were incorporated in that petition.

The COURT.—Motion denied.

Mr. WILLIAMS.—In addition to making that motion, we now make an independent motion to the same effect and on the same grounds set forth in that motion that was made and heard at the commencement of the trial, not only on behalf of all the defendants, but particularly and peculiarly in behalf of the defendant Vaught. [67]

The COURT.—Motion denied.

Mr. McDONALD.—If your Honor please, we respectfully note an exception to both rulings.

TESTIMONY OF EDWARD POWERS, FOR THE GOVERNMENT.

I am and had been for two years last November 1st, a Federal Prohibition Agent. I was present on or about December 13, 1924, at 252 Spear Street in this city. I went there with Agents Shurtleff and Toft. I went in front of the premises and saw nothing that attracted my attention. I went around to the left side of the building which is a corrugated iron building about 25 by 100.

Q. Then you went to the side of the building?

A. I went to the right side of the building; I saw a piece of the corrugated iron on the side loose, I

(Testimony of Edward Powers.)

stretched that and looked in. I could smell the odor of beer; I saw a number of cases in there, and racks with bottles in them—

Mr. WILLIAMS.—Just a moment, Mr. Powers. If your Honor please, I would like at this time to make a motion to strike out the evidence so far as it relates to what was seen after he tore the corrugated iron apart, upon the theory that the tearing apart is against the law, and particularly after the view.

The COURT.—Motion denied.

Mr. WILLIAMS.—Exception.

Mr. GILLIS.—Q. What kind of bottles were those you saw? A. Small pint bottles.

Mr. WILLIAMS.—Your Honor, the same objection. Your Honor, may I make a motion and state my grounds, and then the ruling can apply to all this so as not to delay the trial.

The COURT.—Yes, Mr. Williams.

Mr. WILLIAMS.—To that last question, I would like to have the permission of counsel and the Court that the following [68] objection be interposed before the answer is given, or I can make it to the next one. We object to it, in so far as the defendant Vaught is concerned, because it is evidence obtained or seen in the premises at 252 Spear Street, that the evidence in immaterial, irrelevant and incompetent, and in violation of the rights of the defendant Vaught as accorded to him by the Fourth and Fifth Amendments to the Constitution of the United States, and particularly

(Testimony of Edward Powers.)

in that it appears from the uncontradicted evidence that the hearing of the motion made by Vaught to suppress and exclude all evidence obtained from 252 Spear Street, heretofore made, that:

First. That there was no search-warrant.

Second. There was no lawful entry by Government agents in that they had no reasonable ground or probable cause to enter the said premises.

Third. That there was no reasonable ground or probable cause to believe that beer containing more than one-half of one per cent of alcohol by volume was kept or being made in or on the premises.

Fourth. That the alcoholic content of beer or cereal beverage makes no difference in the appearance or smell, that they look and smell exactly alike; that is to say, there is no difference in the smell or appearance of beer that contains less than one-half of one per cent of alcohol by volume from the smell or appearance of beer that contains more than one-half of one per cent of alcohol by volume.

The COURT.—Objection overruled.

Mr. WILLIAMS.—Now, if your Honor please, I would not like to renew this long objection each time a question is asked, so may it be stipulated that it shall apply as being made to each and every question asked relating to evidence obtained within or from the premises at 252 Spear Street. [69]

The COURT.—Let it be so understood, and the objection is overruled and an exception noted.

(Testimony of Edward Powers.)

Mr. GILLIS.—Q. I show you a bottle marked "29933," and ask you if that is the general character of bottle that you saw there at that time?

A. It is.

Mr. GILLIS.—I ask that this be introduced for identification.

(The bottle was here marked U. S. Exhibit 1 for identification.)

Q. After smelling the odor of beer and seeing these bottles and things, did you see anything else?

A. Yes, I saw two men rolling barrels toward a high iron frame; I afterwards found out it was some sort of a washer or sterilizer.

Q. Then what did you do?

A. I walked to the front of the premises and told the other agents that they were operating—

Q. Don't give any conversations that you had with them, Mr. Powers.

A. I talked to the front of the building and waited until a party came and delivered a package, and as they went inside, as they opened the door to receive the package, I walked in.

Q. With him, or behind him?

A. Behind him. I saw the cases of beer and the bottles of beer, and the machinery.

Q. Was the door opened for this package from the outside, or from the inside?

A. From the inside.

Q. And when you got inside of the door, just inside, what did you see with reference to the arrangement of the building, there?

(Testimony of Edward Powers.)

A. There was an extra door on the inside.

Q. What was that door for, or what did it do?

A. It was to obscure the view from—

Mr. WILLIAMS.—I object to that as calling for the opinion and conclusion of the witness. [70]

Mr. GILLIS.—Q. What did it do, Mr. Powers?

A. It blocked the view of anyone from the sidewalk when the front door was open.

Q. How large a door was that?

A. I should judge about eight or ten feet high.

Q. How wide? A. Completely across.

Q. Across that section of the building?

A. Across that section of the building.

Q. Was that door open or shut when you got in? A. Partly open.

Q. It was partly open? A. Yes, sir.

Q. Could you see on further?

A. I could see on further.

Q. Did you see any of the defendants there at that time when you first went in?

A. I saw the defendant Beamish.

Q. That is the gentleman in the center, here, at the end of the table?

A. Yes, and also another man.

Q. That other man is not there now? A. No.

Q. As I understand it, he escaped at that time?

A. He did.

The COURT.—Q. How did he escape?

A. I followed him around the building for an hour or two, and I left him in charge of one of the

(Testimony of Edward Powers.)

other agents in the rear of the building, and when I went back there he was gone. I was not in charge of the job.

Mr. GILLIS.—Q. Did you make an inspection of the building, itself, to see the apparatus that was there? A. I did.

Q. What apparatus or machinery did you see there?

A. Two 5000 gallon beer vats; two flat fermenting vats; a pasteurizing machine, a bottling and capping machine, a washing-machine, and 25 sacks of sugar, and a lot of dynamos and motors there.

Q. Did you see any of these bottles that you have identified here, similar to U. S. Exhibit 1 for identification? A. I did.

Q. With liquid in them?

A. With liquid in them. [71]

Q. Approximately how many?

A. I should judge there were over 500 cases, about 48 pints each.

Q. To the case? A. To the case.

Q. What was the defendant Beamish doing when you went in?

A. After I walked away from the door he continued on washing barrels. They were turning water into the barrels, and then emptying them again.

Q. Did you inspect the rear part of the building? A. I did.

Q. What did you find there?

(Testimony of Edward Powers.)

A. I found two large vats concealing the hole that led to the premises of Tway, the shipsmith.

Q. Immediately adjoining this building?

A. Immediately to the rear.

Q. What kind of a partition was between Mr. Tway's place and this place?

A. That was corrugated iron; but that was cut out, a sort of a doorway was cut out.

Q. How large?

A. About three feet wide by three feet high. It was concealed by sacks from Mr. Tway's shop. The side where the brewery was was concealed by these large tanks or vats.

Q. Was that open? A. That was open, yes.

Q. Did you inspect to see whether or not there was any connection of pipes there with Mr. Tway's place?

A. Yes, there was a pipe connecting from Mr. Tway's boiler and running through and connecting with this beer still in the premises at 252 Spear Street.

Q. Did you have any talk with Mr. Beamish there at the time? [72]

A. Yes, I spoke to Mr. Beamish, and he didn't know who he was working for, or why he was there, or anything else. He seemed to know absolutely nothing.

Q. Will you describe the front door of 252 Spear Street with reference to how you got in from the outside?

A. It is a sliding door. The way of opening the

(Testimony of Edward Powers.)

lock is to insert a piece of stick and lift up the latch, and then push the door back.

Q. Is there any way of getting the door open without using that little piece of stick?

A. No, sir.

Q. How large is the opening through which this stick is put?

A. Just about an inch, just a small hole.

Q. Just a small hole? A. Yes, sir.

Q. Did you see anyone come in through that door using that means of ingress while you were there?

A. I saw a gentleman that gave the name of Vaught.

Q. And he is the gentleman sitting here behind Mr. Kelly? A. Yes, sir.

Q. How did he gain admission there?

A. He inserted that small stick, and pushed the door back and stepped inside.

Q. And stepped inside? A. Yes.

Q. And closed the door?

A. Well, I was there, and I closed the door.

Q. Did you have any talk with him?

A. Yes, I had a talk with him.

Q. At that time? A. I did. [73]

Q. What did he say?

A. I asked him what he was doing there, and he said he met a fellow in a restaurant, and the fellow told him where he could get some good beer, and so he said he came down there to get some. I asked him what his name was, and he told me his name

(Testimony of Edward Powers.)

was A. J. Vaught. I said, "Who is the lady in the machine?" He said, "That is my wife." I said, "Your wife?" He said, "Yes."

Mr. GILLIS.—Q. Well, you went out and interviewed her? A. Yes, sir.

Q. And then you came back? A. Yes, sir.

Q. And had a further talk with Mr. Vaught.

A. Yes, sir.

Q. What did you say then to Mr. Vaught?

A. I told him the lady said she was not his wife, and his name was not A. J. Vaught, that his name was Parker.

Q. What did he say to that?

A. He said nothing to that.

Q. Did you have any further talk with him?

A. No; Mr. Shurtleff was then talking to him.

Q. Do you know whether or not the United States Chemist came there at that time?

A. We sent for a chemist immediately.

Q. And he came? A. And he came.

Cross-examination.

Mr. WILLIAMS.—Q. Mr. Powers, when you speak of the right side of that building, which side do you mean? A. The north side.

Q. And after you had pulled apart this piece of corrugated iron [74] and went around to the front of the building, was there anybody in the front of the building at that time?

A. Shurtleff and Toft.

Q. No one else? A. No one that I saw.

(Testimony of Edward Powers.)

Q. You are quite positive of that?

A. Well, I noticed no one else there. There may have been. There are people passing to and fro there all day.

Q. How long did you stand outside of the front door before you entered the premises 252 Spear Street? A. I should judge about ten minutes.

Q. And during that time no one else went to the front door whilst you were standing there?

A. I believe someone left a package there.

Q. Who was it that left the package?

A. I don't know.

Q. Where did he leave it?

A. At the side of the door.

Q. Then there was some one that came to the door, after you were standing in front?

A. There might have been quite a few people pass there.

Q. A man came and left a package, didn't he?

A. Yes.

Q. Did you see that man come up?

A. I don't recollect whether I saw him leave the package, or not; I was talking to Shurtleff at the time.

Q. What did this man do?

A. I believe he knocked at the door.

Q. Did you see him knock at the door?

A. I believe I did.

Q. Would you swear to that, Mr. Powers? [75]

A. I would not be positive of that.

Q. After you stayed there about ten minutes,

(Testimony of Edward Powers.)

and you approached the front door of that building, did anyone come to the front door of the building from within the building? A. Yes.

Q. Who? A. This man here.

Q. When you say "this man here" you mean Mr. Beamish? A. Mr. Beamish.

Q. This is the man, is it?

A. I believe it is, yes.

Q. How long after you arrived at the front of the building did this man come to the front door?

A. I should judge about ten minutes.

Q. About ten minutes after you arrived there?

A. I should judge so.

Q. Was the door open when you arrived at the front door? A. No, sir.

Q. Was it locked? A. Yes.

Q. How did you get in?

A. When the door was opened, I walked in.

Q. Who opened that door

A. I believe Mr. Beamish.

Q. Did you knock to get in? A. No, sir.

Q. You stood there until he opened the door?

A. Yes, sir.

Q. Did Mr. Shurtleff knock?

A. Not that I know of.

Q. Did Mr. Toft knock?

A. Not that I know of.

Q. But Mr. Beamish came to the door, nevertheless; and when Mr. Beamish came to the door did he open it? A. The door was opened, yes.

Q. Did he open it?

(Testimony of Edward Powers.)

A. I believe he did. It was opened from the inside, I guess he opened it.

Q. Did you walk in there? A. Yes, sir. [76]

Q. Did you place your foot on the sill of the door as you came in? A. I did.

Q. So that the door could not be re-closed, could it? A. No.

Q. When did you arrest Mr. Beamish?

A. We walked to the rear of the premises and saw the beer and the apparatus, and we told him he was under arrest, and we sent for the chemist.

Q. Was Mr. Vaught on the premises at that time?

A. No, sir, he was not.

Q. Then had you arrested either Mr. Vaught or Mr. Beamish at the time you placed your foot in the front door so it could not be closed?

A. Yes, we told him he was under arrest at the time, told him we were Federal officers and showed the badge.

Q. I understood you to say you arrested Mr. Vaught after you walked through the premises.

A. I did not; Mr. Vaught was not on the premises.

Q. I understood you to testify a moment ago you arrested Mr. Beamish, after you walked through the premises.

A. I testified I arrested Mr. Beamish after he opened the door and we walked in. That was some time after we entered the premises.

Q. Didn't you testify that you arrested Mr.

(Testimony of Edward Powers.)

Beamish after you went inside, walked into the premises and saw the machinery?

A. I arrested Mr. Beamish at that time.

Q. That is not an answer to my question.

The COURT.—What he said was, Mr. Williams, that he arrested Mr. Beamish in the back part of the premises after he had gone in.

Mr. WILLIAMS.—Yes, and after he had seen some of the machinery lined up there.

The COURT.—Yes.

Mr. WILLIAMS.—Q. When did you actually arrest Mr. Beamish—after you had gone into the building and got to the back of it [77] or did you arrest him just as you went in the place, in the first instance?

A. I stepped in the door and said, "Federal Agents," and walked to the rear of the building through the other door, and then I turned to him and said, "You are under arrest."

Q. Had you arrested either Mr. Vaught or Mr. Beamish before you placed your foot in the door and got into that building?

The COURT.—What you are asked, Mr. Powers, is this: When you put your foot on the door jamb and walked in, had you placed anybody under arrest?

A. As I put my foot on the door jamb, I said, "Federal Agents," and as I walked back I said, "You are under arrest."

Mr. WILIAMS.—Q. I will ask you this question again, Mr. Powers: Had you arrested or

(Testimony of Edward Powers.)

stated to Beamish that he was under arrest before you placed your foot on the door sill, so that he could not shut the door?

Mr. GILLIS.—I think that has been asked and answered.

The COURT.—Let him answer it again.

A. I put my foot on—

Mr. WILLIAMS.—I submit I am entitled to a "Yes" or "No" answer.

The COURT.—Answer "Yes" or "No."

A. No.

Mr. WILLIAMS.—Q. You testified on your direct examination as I understood you, that before you entered the building, when you looked into the building after pulling aside this piece of corrugated iron, that you saw bottles.

A. Beer bottles, yes.

Q. Do you know the difference between the bottle in which beer which contains more than one-half per cent of alcohol by volume might be put from a bottle in which the ordinary beer or near beer, or cereal beverage, is contained?

A. I suppose they are bottled the same. [78]

Q. At that particular time, did you know which type of bottle it was? A. Except by the odor.

Q. What is the difference in odor between near beer and beer?

A. That I don't know, but beer has a distinctive smell about it.

Q. Is there a difference in the odor between near beer or cereal beverage containing less than one-

(Testimony of Edward Powers.)

half per cent of alcohol by volume, and beer which contains more than one-half per cent of alcohol by volume?

A. I never have had any experience with near beer.

Q. Do you know any difference between the smell of these two types of beer?

A. Not to my knowledge.

Q. Then when you did smell this beer, as you have said, you didn't know whether you were smelling near beer or real beer?

A. I was under the belief that I was smelling real beer.

Q. You were under that belief? A. Yes, sir.

Mr. WILLIAMS.—Q. After you looked in the hole or aperture made by pulling back the piece of iron on the side of the building—

A. The hole was already made, Mr. Williams, I only stretched it a little.

Q. You stretched it a little? A. Yes.

Q. Did you at that time make a statement to Mr. Vaught, "This doesn't smell like a still, I think it is a home-brew plant?"

A. No, sir. I said, "This is not a still, it is a beer plant"—not a home-brew plant, a beer plant.

Q. Did you not say to Mr. Vaught at that time words to this effect: "This is not a still, I think it is a home-brew plant," or a beer plant, or words to that effect? A. I said, "This is not a still"—

Mr. GILLIS.—Just a moment. I understand

(Testimony of Edward Powers.)

this is for the purpose of impeachment, is it, Mr. Williams? [79]

Mr. WILLIAMS.—Yes.

Mr. GILLIS.—There has been no statement as to who was present at that conversation, where it took place, and when.

Mr. WILLIAMS.—I am taking your location for it. You located those two men on the north side of the building, what he called the right-hand side. That is the place I have in mind. Mr. Toft and Mr. Powers were present.

A. Mr. Shurtleff was present; Mr. Toft did not go to the side of the building with me at all. Mr. Shurtleff was present when I made that statement that it was not a still, it was a beer plant.

Mr. WILLIAMS.—That is all.

Redirect Examination.

Mr. GILLIS.—Q. When you looked through the hole, could you see any labels on any of the bottles you saw?

Mr. WILLIAMS.—I object to that as suggestive and leading.

The COURT.—Objection overruled.

A. No, sir.

Mr. GILLIS.—That is all. [80]

TESTIMONY OF A. R. SHURTLEFF, FOR THE GOVERNMENT.

Thereafter, A. R. SHURTLEFF, was called and sworn as a witness on behalf of the United States and testified on direct examination as follows:

Mr. GILLIS.—Your position with the Government is what? A. A federal prohibition agent.

Q. How long have you been such?

A. Five years this month.

Q. On December 13, 1924, did you have occasion to visit 252 Spear Street, San Francisco?

A. I did.

Q. Who did you go there with, Mr. Shurtleff?

A. Agents Powers and Toft.

Q. And when you arrived at the building, just what did you do?

A. I went around to the right side of the building, facing it, Agent Powers and I. Mr. Powers saw a loose piece of galvanized iron and we lifted the corner up and we looked in. At the same time we could smell beer. Upon looking in the building we could see bottles with no labels on them sitting in racks—

Mr. WILLIAMS.—If your Honor please, the order of Court will be that my objection goes to this testimony also, the same as with Mr. Powers?

The COURT.—Yes.

Mr. GILLIS.—Q. Those bottles that you saw were similar to Government Exhibit 1 for Identification? A. Yes.

(Testimony of A. R. Shurtleff.)

Q. You say there were no labels on them that you could see? A. No, sir.

Q. Where did you go then, and what did you do?

A. We went around to the front of the building and stayed near the automobile for five or ten minutes; presently a man drove up and dropped off a package of bottle covers at the side of the door; we waited a few more minutes and Mr. Beamish came to the door and opened the [81] *the* door. At that time Agent Powers stepped up to the door, and we walked in.

Q. Did you go in with Powers?

A. I followed him in.

Q. What did you see in there when you went in?

A. We estimated there were about 500 cases of beer and various kinds of machinery for the manufacture of beer, for washing bottles, and tags, and everything to make beer was there.

Q. Similar to the list of machinery and vats Mr. Powers has already testified to? A. Yes.

Q. Did you have any talk with Mr. Beamish at that time, yourself?

A. We tried to talk to him, but he didn't care to talk.

Q. He would not talk at all? A. No.

Q. Did you talk with Mr. Vaught any, or did you see him there? A. I did.

Q. When did you first see him?

A. When we were in the building some time. I don't know just how long the front door was closed, and Mr. Vaught opened it up with a small stick that

(Testimony of A. R. Shurtleff.)

you insert in a small hole to throw the latch back and stepped inside. That was the first time I saw him.

Q. Did you have a talk with him yourself?

A. We talked with them. I talked with him. I asked him what he was doing there; he stated he met some men uptown who told him where he could get some good beer, and he said he was there looking for some good beer.

Q. Did you have any additional talk with Mr. Vaught?

A. I talked with him when riding over to the police station. He denied everything. I was talking about Vallejo, and he denied that the plant had been moved from there.

Q. I show you some photographs and ask you to look those over; I will ask you if you recognize them. A. Yes, sir.

Q. When were these photographs taken?

A. On December 13th.

Q. That was the day of the seizure?

A. The day of the seizure. [82]

Q. What do they represent? I will show you this one photograph and ask you what that represents?

A. This is a photograph of the boiler, where the steam was coming from in the shipsmith's shop.

Q. That was Mr. Tway's shop? A. Yes.

Q. Do you know whether or not the boiler depicted in this picture was hooked up in any way?

(Testimony of A. R. Shurtleff.)

A. A steam line was running from that plant into the brewery.

Q. Was that taken at the same time?

A. Yes, that is a picture of Mr. Vaught.

Mr. WILLIAMS.—Just a moment. I do not think that is pertinent at this time.

Q. When that picture was taken of Mr. Vaught, was Mr. Vaught under arrest?

A. He was under arrest, and he kindly consented—

Mr. WILLIAMS.—I move to strike that out.

Q. Was he under arrest? A. Yes, sir.

Mr. WILLIAMS.—Your Honor, these other photographs we don't object to. I don't believe that taking a picture of a defendant while he is under arrest is admissible. The rest of them, if Mr. Gillis assures them they are true representations of the place—I have never been there myself—I have no objection to them.

The COURT.—I don't see that that adds or detracts from it one way or another, so far as that goes, Mr. Williams, unless he denies he was there.

Mr. WILLIAMS.—No, he doesn't deny that, but he was under arrest at the time.

The COURT.—I think I will sustain the objection to that one.

Mr. GILLIS.—Very well, I will not offer that one. I offer the balance of the photographs and ask that they be marked U. S. Exhibit 2.

(The photographs were here marked U. S. Exhibit 2.) [83]

(Testimony of A. R. Shurtleff.)

Q. This picture that I show you, what is that, Mr. Shurtleff?

A. Polished tanks upstairs in the building. They were very highly polished. They were up in the attic.

Q. And this picture that I am showing you?

A. One of the big tanks used in the premises.

Q. And this one, you have already stated, is the steam plant in Mr. Tway's place that was connected? A. Yes.

Q. And the next picture that I show you?

A. That shows a number of the 500 cases that we have spoken about.

Q. And the next picture?

A. That shows the barrels, the bottle washer, and other machinery. This picture is of Tway's shop.

Q. And shows what? A. It shows the hole.

Q. What hole?

A. Where they can get through from one building to another.

Q. What building do they get through from?

A. They go from 252 Spear Street to Tway's shop.

Q. What is this picture?

A. That was another picture of the steam boiler, showing the pipe connection.

The COURT.—Q. The pipe connection from Tway's shop? A. Yes, sir.

Mr. GILLIS.—Q. I show you a small slip of paper and ask you if you recognize that?

(Testimony of A. R. Shurtleff.)

A. Yes, sir.

Mr. WILLIAMS.—Your Honor, this was seized upon the premises, and is subject to our objection and motion?

The COURT.—Yes.

Mr. GILLIS.—Q. Where was this slip of paper that I show you taken from, or where did you get it?

A. It was taken from the premises, 252 Spear Street.

Q. At that time? A. Yes, sir.

Mr. WILLIAMS.—I object to it, your Honor, as being subject to our general objection, on the grounds made at the opening.

The COURT.—Q. This was found on the premises? [84] A. Yes, sir.

Mr. WILLIAMS.—I might make another objection, that there is no connection made at this time.

Mr. GILLIS.—I ask that it be introduced in evidence.

The COURT.—There is some evidence that Mr. Vaught's true name is Parker.

Mr. GILLIS.—Yes, there has been some evidence on that.

Mr. WILLIAMS.—I do not think that there can be any evidence that his true name is Parker.

Mr. GILLIS.—Not his true name, but a name that he went under.

Mr. WILLIAMS.—The witness asked him if it was not the fact. I will state to the Court that

(Testimony of A. R. Shurtleff.)

Vaught's true name is Vaught. He was at one time a boxer, or prizefighter, and went under the name of Parker, and followed that name quite a lot.

The COURT.—I will admit it.

Mr. WILLIAMS.—I don't make the objection on that technical ground, but I make it on the broad ground.

The COURT.—Yes, I will overrule the objection. I think that is covered, Mr. Williams, by the recent case of Sayors, in the Court of Appeals.

(The paper was here marked U. S. Exhibit 3.)

Mr. GILLIS.—In examining the bottles you found in that place, Mr. Shurtleff, did you find any labels on any of the bottles? A. No. sir.

Q. No labels of any kind? A. No, sir. [85]

Cross-examination.

Mr. WILLIAMS.—Q. Those pictures that you have testified concerning are true representations of the inside of that brewery?

A. I think so, yes.

Q. In other words, the machinery loomed up just as largely as it does in these pictures?

A. Yes, sir.

Q. They were not taken at a close distance to make them look large, were they? A. No.

Q. And as you come into the building and walk from the front to the rear, you see the machinery that appears exactly as that representation is made in the photographs? A. Yes.

(Testimony of A. R. Shurtleff.)

Q. In other words, when you come in the front door, the first thing you see would be these pieces of machinery? A. Yes, sir.

ANALYSIS OF BEER.

After the testimony of Mr. Shurtleff was completed the following proceedings were had:

The COURT.—Can't you let the chemist go, Mr. Gillis?

Mr. WILLIAMS.—Your Honor, we will stipulate that this beer contains more than one-half of one per cent of alcohol by volume.

The COURT.—How much does it contain?

Mr. GILLIS.—If you will stipulate that it is over 4 per cent, Mr. Williams, I will take your stipulation.

Mr. WILLIAMS.—I don't know that, I never tested it.

The COURT.—How much is it?

Mr. LOVE.—(The Chemist.) Some is 4.3 and some is 4.4.

Mr. WILLIAMS.—We will accept that statement.

The COURT.—Gentlemen, the beer contains 4 or more per cent of alcohol by volume. That is all, Mr. Love, you can go now.

Mr. GILLIS.—I ask that all these bottles be introduced in evidence, 29,923, 29,925, 29,926, 29,937— [86]

The COURT.—That is enough, Mr. Gillis.

(Testimony of E. E. Tway.)

Mr. McDONALD.—It is subject to the objection, your Honor, heretofore made.

The COURT.—Yes.

TESTIMONY OF E. E. TWAY, FOR THE GOVERNMENT.

Thereafter, E. E. TWAY was called and sworn as a witness on behalf of the Government and testified as follows:

I am in the business of a steel and iron forger at 227–229 Main Street, in San Francisco, and have been in that business about five years. My building backs up against 252 Spear Street. The photograph you show me (part of Government Exhibit 2) is part of my shop. I see the sacks are piled up against the corrugated iron partition there at the back of the shop. The building on the other side of partition is the place which was seized on December 13. I supposed it was a syrup place. The other picture is the steam boiler in my plant. Two men, neither of whom is any of the defendants sitting in Court, came to see me about the 5th or 6th of August, with reference to connecting up steam with the place at 252 Spear St. They arranged with me to furnish steam at Thirty Dollars ($30.00) per month and later one of them gave me a check for Sixty Dollars ($60.00). This one gave his name as Mr. Stearns. I furnished steam up to December 13. [87]

TESTIMONY OF GEORGE V. LE ROY, FOR THE GOVERNMENT.

Thereafter, GEORGE V. LE ROY was called and sworn as a witness on behalf of the Government and testified on direct examination as follows:

I am the assistant manager of the Cereal Products Refining Corporation in this city. My company handles malt syrup and compressed yeast and vinegar. Those two sheets of paper attached together which you show me are records of my company kept in the regular course of business. (These documents were here introduced in evidence and marked U. S. Exhibit 5.) They show the delivery of 1 barrel of Peerless Malt to 252 Spear Street, which is invoiced to 106 Stewart Street and billed to J. A. Hieronimus & Sons.

I recognize that as one of the regular office records of my company kept in the regular course of business. (The document was introduced in evidence and marked U. S. Exhibit 6.) These represent shipments going outside of San Francisco sold to J. Hieronimus & Sons. The two small slips of paper dated November 29, 1924, which you show me are of the regular records of my office kept in the regular course of business. They are duplicates, carbon copies of receipts given to the driver. (These documents were introduced in evidence and marked U. S. Exhibit 7.) These barrels of malt are charged to Mr. Hieronimus; some of them are paid for. The goods are barrels of bakers' malt used for bakers' purposes.

(Testimony of George V. Le Roy.)

Cross-examination.

On cross-examination this witness testified he had done business with Mr. Hieronimus for years. [88]

TESTIMONY OF JOHN LANKENAU, FOR THE GOVERNMENT.

Thereafter, JOHN LANKENAU, was called and sworn as a witness on behalf of the Government and testified on direct examination as follows:

I am a shipping driver delivering for the Cereal Products Refining Corporation. I recognize Government Exhibit 7. I delivered the malt syrup noted on those delivery tags to 252 Spear Street. I saw the defendant Beamish, there; I do not recognize the other defendants. I made other deliveries of malt syrup there.

Cross-examination.

On cross-examination, this witness added nothing to his testimony on direct examination. [89]

TESTIMONY OF FRANK X. METTMANN, FOR THE GOVERNMENT.

Thereafter, FRANK X. METTMAN was called and sworn as a witness on behalf of the Government and testified on direct examination as follows:

I am in the real estate business with the firm of Buckbee, Thorne & Co., San Francisco; I have the lease covering 252 Spear St. This is the only lease I know of to those premises which has been executed since the 21st day of July, 1924. It was

(Testimony of Frank X. Mettmann.)

signed in my presence by Mr. Stearns, who was introduced to me by Mr. Hieronimus. The lease shows the premises rented to Max Stearns for a period of three years from July 25, 1924, for the purpose of running a business of blending and packing syrups and similar products.

Cross-examination.

On cross-examination the witness, Mettmann, testified that Mr. Hieronimus said:

This is Mr. Stearns, a prospective customer of mine. [90]

TESTIMONY OF R. P. MERILLON, FOR THE GOVERNMENT.

Thereafter, R. P. MERILLON was called and sworn as a witness on behalf of the Government and testified on direct examination as follows:

I am connected with the Standard Box Company. I sold to J. Hieronimus aid delivered to 252 Spear Street, 1000 boxes of the size and type shown in Government's Exhibit 2. Those tags show this. (The tags are admitted in evidence and marked U. S. Exhibit 8.)

Cross-examination.

On cross-examination the witness, Merillon, testified that the boxes were ordered by defendant Hieronimus and delivered in different amounts at various times. [91]

TESTIMONY OF DENNIS DOUGHERTY, FOR THE GOVERNMENT.

Thereafter, DENNIS DOUGHERTY was called and sworn as a witness on behalf of the Government and testified on direct examination as follows:

I am a teamster working for the Standard Box Co. I delivered the boxes shown on U. S. Exhibit 8 to 252 Spear Street. I saw the defendants Beamish and Vaught there, each of them signed for some of the boxes.

Cross-examination.

On cross-examination the witness, Dougherty, testified as follows:

The first delivery I made was in September, 1924; I went inside at that time. There were a lot of barrels in there and stuff on the floor. I did not see any machinery. [92]

TESTIMONY OF C. H. KORNBECK, FOR THE GOVERNMENT.

Thereafter, C. H. KORNBECK was called and sworn as a witness on behalf of the Government and testified on direct examination as follows:

I am secretary of the Bauer-Schweitzer Hop & Malt Co. The three sheets of paper you show me are records of my company kept in the regular course of business. (The document was introduced in evidence and marked U. S. Exhibit 9.) Exhibit 3 is the original of which Exhibit 9 is a duplicate,

(Testimony of C. H. Kornbeck.)

dated November 28, 1924. The invoices were met by Hieronimus. He paid for them. We charged them to him because he ordered the goods. He said these goods were to be charged part to Parker and part to him. We shipped goods to Parker in Vallejo. The one for November 17th is 1 barrel of lye, a washing soda preparation. The one on December 2, 1924 is for Crown bottle caps, used for bottles, such as appear on the top of bottle No. 29,937. The lower part of the item is 5 bales containing 3500 each of paper wrappers used to protect the bottle in shipping and the one of November 28th is also paper wrappers.

Cross-examination.

On cross-examination the witness, C. H. Kornbeck, testified as follows:

The business of my company is manufacturers of malt. We also sell bottlers' supplies. In the past three years we have sold a great deal of goods to Mr. Hieronimus as a jobber. [93]

TESTIMONY OF RASMUS BUSK, FOR THE GOVERNMENT.

Thereafter, RASMUS BUSK was called and sworn as a witness on behalf of the Government and testified on direct examination as follows:

I delivered the things shown on Government Exhibit 9 to 252 Spear Street.

(Testimony of Rasmus Busk.)

AFFIDAVIT OF DEFENDANT VAUGHT.

Thereafter, the Government offered in evidence a portion of the petition of Defendant A. J. Vaught for the exclusion of evidence, and the following proceedings occurred:

Mr. GILLIS.—There was presented in this court a petition by A. J. Vaught, one of the defendants in this action, for the exclusion of evidence. Attached to that petition is an affidavit by Mr. Vaught. I desire to offer that affidavit in evidence and read the same.

Mr. WILLIAMS.—Before the affidavit is read, I would like to object to it as immaterial, irrelevant and incompetent, as an affidavit made prior to trial, and made necessary by the rules of this court, and the decisions, in order that a defendant may avail himself of his constitutional rights under Amendments 4 and 5 to the Constitution of the United States.

The COURT.—That does not make it inadmissible if it contains any statements or admissions. Let me see it, Mr. Gillis. Objection overruled.

Mr. WILLIAMS.—Exception. If your Honor please, the affidavit that was made here is the affidavit annexed to the petition. If Mr. Gillis is going to read the affidavit, the entire declaration should be read.

The COURT.—You mean the petition? [94]

Mr. WILLIAMS.—Yes.

The COURT.—Is there anything in the petition that is material?

(Testimony of Rasmus Busk.)

Mr. WILLIAMS.—I think so, yes, your Honor.

The COURT.—The affidavit is admitted because it is clearly a statement and an admission on Mr. Vaught's part.

Mr. WILLIAMS.—We are not making any contention to the contrary. We do make the claim that you can't take part of a declaration, or part of a statement, and read that without reading it all. The affidavit makes the petition a part and parcel of it. It is a verified petition. If it is all let in, we are satisfied.

The COURT.—I don't see anything here, Mr. Williams, except the first paragraph.

Mr. WILLIAMS.—Don't you think, your Honor, that that is a matter of fact for the jury to determine, to take a part of a witness' declaration or conversation—

The COURT.—No, I don't think so at all. The only part of the affidavit that is material is the part in which he states that he is in possession and control of these premises, and that these other persons in there were his employees. That is what he states in the first paragraph. I will admit the affidavit of Mr. Vaught and the first paragraph of the petition. The other part of it is not material to any issue here. They are material to your motion, but they are not material to any issue before the jury.

Mr. WILLIAMS.—I take an exception. It is my understanding that where there is submitted a declaration of a defendant, or a conversation of a defendant, the entire conversation goes in, and the

triers of the facts—in this case the jury—are entitled to have all the facts. [95]

The COURT.—That is not the correct theory, Mr. Williams; the correct theory is that if a part of a statement is admitted, all other material parts are admitted. Those parts of the conversation, or statements in writing which are not material, are not admissible.

Mr. WILLIAMS.—We note an exception, your Honor.

The COURT.—Yes. You may read the first paragraph of the petition and that part of the affidavit which pertains to it. (Here Mr. Gillis read the first paragraph of the petition of Defendant Vaught, hereinbefore in this bill of exceptions set forth, and the affidavit annexed to said petition and marked Exhibit "C," and which is also hereinbefore in this Bill of Exceptions set forth, but read no other part of said petition or of the Exhibits attached thereto or made a part thereof.)

TESTIMONY OF TWAY STRUCK OUT.

Thereafter, on motion of defendants' attorneys, the Court struck out the testimony of Mr. Tway as far as related to any arrangements made with a man calling himself Mr. Hieronimus and instructed the jury to disregard the testimony stricken out.

MOTION FOR A DIRECTED VERDICT.

Thereafter, Mr. Williams, attorney for defendants moved for a directed verdict, and the following proceedings were had:

Mr. WILLIAMS.—I would like to make a motion for a directed verdict in behalf of certain of these defendants. I have it prepared, and I would like to formally read it into the record and present it as briefly as I can. Before presenting it, I would like to lay stress upon the evidence just offered by the Government containing a declaration of Vaught that he was in control and the lessee of the premises 252 Stewart Street.

The COURT.—On whose behalf are you making the motion? [96]

Mr. WILLIAMS.—I will indicate it as I go along, your Honor. The first motion for a directed verdict is made by the defendant A. J. Vaught. I have prepared a formal motion and I will file it, and I have served a copy on the United States Attorney.

The motion on behalf of the defendant, A. J. Vaught, reads as follows: [97]

In the Southern Division of the United States District Court for the Northern District of California.

No. 16,120.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MAX A. STEARNS, A. J. VAUGHT, J. HIERONIMUS, JOHN BEMAS and JOHN DOE,

Defendants.

MOTION FOR DIRECTED VERDICT BY A. J. VAUGHT.

Now comes the defendant A. J. Vaught, in the above-entitled cause and by his counsel, Williams, Kelley & McDonald, at the close of the Government's case and after the Government has put in all of its evidence and moves the Court to direct the jury to find the said defendant not guilty of the offense alleged in the first count; not guilty of the offense alleged in the second count; not guilty of the offense alleged in the third count; not guilty of the offense alleged in the fourth count of the information on file herein and to find the said defendant not guilty of any offense charged or set forth in said information upon the following grounds:

COUNT I.

I.

The evidence adduced fails to prove or tend to prove the offense charged in the first count.

II.

The evidence adduced fails to prove that this defendant did, on or about the 13th day of December, 1924, at 252 Spear St., have in his possession, property designed for the manufacture of liquor, to wit: [98]

> 5000 gallon fermenting tanks; 5000 gallon beer boiler; 2 500 gallon vats; 2 flat fermenting vats, capacity about 5000 gallons each; bottling machinery; pasteurizer; bottle-washing machinery and machinery of all kinds used in the manufacture of beer, and 25 sacks of sugar.

then and there intended for use in violating Title II of the National Prohibition Act in the manufacture of intoxicating liquor containing one-half of one per cent and more of alcohol by volume and which was then and there fit for beverage purposes.

III.

The evidence adduced fails to show or tend to show that this defendant did have in his possession such property or any part of it at all either by himself or together with any other person or persons on or about the 13th day of December, 1924.

IV.

The evidence adduced fails to prove or tend to prove that this defendant intended to use any property whatsoever for use in violating the National Prohibition Act.

COUNT II.

I.

The evidence adduced fails to prove or tend to prove the matters charged in the second count against this defendant.

II.

The evidence adduced fails to prove or tend to prove that this defendant committed any nuisance in wilfully, knowingly or unlawfully manufacturing on the premises aforesaid any beer containing one-half of one per cent or more of alcohol by volume and or fit for use for beverage purposes.

III.

The evidence adduced fails to prove or tend to prove that this defendant did manufacture any in-

toxicating liquor or liquor containing one-half of one per cent or more of alcohol by volume. [99]

COUNT III.

I.

The evidence adduced fails to prove the matters charged against this defendant in the third count of said information.

II.

The evidence adduced fails to prove, or tend to prove that this defendant did manufacture any intoxicating liquor on or about the 13th day of December, 1924, or liquor containing one-half of one per cent or more of alcohol by volume.

COUNT IV.

I.

The evidence adduced fails to prove, or tend to prove, the matters or things set forth in said fourth count against this defendant or any of them.

II.

The evidence adduced fails to prove, or tend to prove, that this defendant had in his possession, on or about the 13th day of December, 1924, at 252 Spear Street, in the city and county of San Francisco, any beer containing one-half of one per cent or more of alcohol by volume.

And this defendant sets up as further grounds for the granting of this motion as to all of the counts and each of them, all of the matters and things and each of them heretofore set forth to the specific counts, together with the following grounds, to wit:

I.

That the evidence adduced fails to prove the matters and things set forth in said information, and or in any of the counts thereof, and or any of them. [100]

That the evidence adduced fails to prove, or tend to prove, that this defendant either individually, or in conjunction with any of the other defendants, or any other person or persons, in any manner violated the National Prohibition Act.

Dated: January 26, 1925.

(Signed) WILLIAMS, KELLY & McDONALD,
Attorneys for said Defendant.

[Endorsed]: Filed January 26, 1925. Walter B. Maling, Clerk. By Lyle Morris, Deputy Clerk. [101]

Mr. WILLIAMS.—With reference to the defendant, Vaught, I have not included the ground that I would like to include, namely, the ground indicated at the commencement of the trial, that he, being the lessee of the owner, and in control of these premises, that the search was unlawful, that there was an unlawful entry into his premises. I would like that to be incorporated, in addition to that which we have in the written motion.

The COURT.—Both motions denied.

Mr. WILLIAMS.—Exception. [102]

TESTIMONY OF J. HIERONIMUS, FOR DEFENDANTS.

Thereafter, J. A. HIERONIMUS, was called as witness for the defendants and each of them and testified as follows:

I am a broker handling the lubricating oil line and malt syrups. I know the defendant, A. J. Vaught, and sold him goods and did business with him as owner of the premises at 252 Spear Street. (An adjournment was here taken until January 27, 1925, until 10:30 o'clock A. M.)

On January 27, 1925, at 10:30 o'clock A. M. the Court met pursuant to adjournment, the parties being present as before and the jury all being present in the jury-box, and the defendant, Hieronimus, continued with his testimony as follows:

A Mr. Stearns rented the premises at 252 Spear Street in September, 1924, and later on at the end of October, he sold out his business to, and the premises were taken over by the defendant, A. J. Vaught. He bought goods from me as a jobber. None of my dealings with him were carried on in secret.

Cross-examination.

On cross-examination of the witness, Mr. Hieronimus testified as follows:

I knew him in Vallejo. I did not know he had moved to San Francisco from Vallejo until he came in and told me he had taken Stearns' business over. When he came to see me I agreed to supply some

(Testimony of J. Hieronimus.)
malt syrup to him, and later on to sell him some boxes. He did not buy much malt syrup from me. [103]

Thereafter, defendants closed their case and the prosecution having nothing in rebuttal, the matter was argued by counsel.

The above constitute all of the evidence, oral and documentary and exhibits introduced on behalf of the United States and on behalf of the defendants and each of them.

Thereupon, the Court charged the jury as follows:

INSTRUCTIONS OF THE COURT TO THE JURY.

"Gentlemen: The District Attorney for this district has filed here an information against four defendants, three of whom are on trial, the fourth not having been apprehended. It is therefore your duty to find as to each one of the three defendants who are here, namely, Mr. Hieronimus, Vaught and Beamish, separately as to whether they are 'guilty' or 'not guilty.' "

"The information, Gentlemen, contains four counts or charges, and it will be your duty to find each of the defendants either guilty or not guilty upon each one of these counts or charges. You may find them or either of them guilty or not guilty upon any one or more and not guilty upon the others, according as to you the evidence may seem to justify."

"The filing of the information, Gentlemen, is not to be considered by you as any evidence whatsoever against these defendants because that is the manner or one of the manners prescribed by the law by which a man is charged and brought into court to answer the charge before a jury of 12 men of his own choosing; it is that and nothing more."

"But, on the contrary, the law presumes that every man charged with crime in a court of justice is innocent. That presumption of innocence attends him at all stages of the trial, and is real evidence in his favor, and accompanies him, Gentlemen, at all times, until the Government has overcome that presumption by evidence which satisfies your minds to a moral certainty and beyond a reasonable doubt."

"Moral certainty means that kind of convincing proof which ordinarily produces conviction in the unprejudiced mind; less than that leaves a reasonable doubt. Reasonable doubt, however, Gentlemen, is not any doubt, because it is rare indeed that it is possible to produce evidence free from any doubt whatsoever; but it means the kind of doubt which would influence you in the most important affairs of your own life; and until the Government has produced a case free from that kind of doubt the defendants must be granted the presumption of innocence."

"Neither, Gentlemen, are you to convict these men, or either of them upon any suspicion or conjecture or anything of that sort. You must weigh all of the evidence and make up your minds whether

or not the evidence produced by the Government leaves no reasonable doubt of the guilt of these men, or either one of them."

"The first count or charge, Gentlemen, is that these defendants had in their possession certain property designed or intended for the manufacture of liquor containing more than one-half of one per cent of alcohol by volume and fit for beverage purposes. Now, possession, of course, does not and in the very nature or character of the property here involved, could not mean manual possession. It does not necessarily mean even that in [104] order to find the man guilty of possessing it that he was ever in the place where it was kept or stored or used."

"It is sufficient to find a man guilty of possession, if you find that the property was designed for the manufacture of liquor of the alcoholic content I have explained, and was in any manner under his control, or that he had any interest in it,—of course, knowing the purpose for which it was to be used."

"As far as the defendant Beamish is concerned, I instruct you, Gentlemen, that if the defendant Beamish was an employee there and aided in the manufacture of the beer, knowing it was beer,—that is beer containing more than one-half of one per cent of alcohol per volume, fit for beverage purposes, he would be equally guilty as if he were the owner."

"The second count or charge is that these defendants there maintained a nuisance. The statute

familiarly known as the Volstead Act provides that the possession of property—no; strike that out. The Volstead Act provides that the manufacture of liquor containing more than one-half of one per cent of alcohol by volume constitutes the place where it is so manufactured a nuisance."

"If therefore you find that these defendants or either of them actually manufactured any beer containing more than one half of one per cent of alcohol per volume in that place, then the person whom you may find manufactured it is guilty of maintaining a nuisance at that place, No. 252 Spear Street."

"In a similar manner a man may be guilty of manufacturing illegal liquor even though he may never have been in the place where it is manufactured; if he had any interest therein or knowingly contributed thereto, he is equally guilty as if he participated in it."

"The third count or charge is that these defendants there manufactured beer. That needs no further elucidation; nor does the fourth count, which is merely a charge that they had in their possession there some 500 cases of beer containing more than the percentage of alcohol stated."

"Now, Gentlemen, so far as the defendants Beamish and Vaught are concerned, they have not taken the witness-stand in their own behalf. Under our Constitution and system of laws no man can be compelled to be a witness against himself; no more can anything be presumed against him because he fails to take the witness-stand in his own behalf. There-

fore, I instruct you that the failure of the defendants Beamish and Vaught to testify in their own behalf is not to be considered by you in any manner, shape or form as any evidence against them."

"On the contrary the defendant Hieronimus did take the stand in his own behalf. You must weigh his evidence in the same manner as you would that—the evidence—of any other witness; that is to say, you must determine his credibility and the extent to which you are going to accept his testimony from his appearance and his manner on the stand, the way in which he testified, the validity—the integrity of the testimony he gave,—whether it is consistent with itself and consistent with the other evidence and admitted facts of the case."

"In other words, weighing his evidence as you would the testimony of any other witness, bearing in mind, however, his interest in the outcome of the case." [105]

"Now, so far as the defendant, Hieronimus, is concerned, Gentlemen, the testimony is to the effect that there were various things bought by him and supplied to those premises, 252 Spear Street; that he went to one man who was there before Stearns to see about arranging for the getting of steam from the neighboring premises into this place. That he went to see the real estate agent with Stearns with reference to the leasing of this place—matters of that kind and character."

"His testimony is to the effect that, on the contrary, all that he did in connection therewith was in the first place to arrange for Mr. Stearns to get

this steam, and to get the premises, because he expected that Stearns was going to open up a place there for the blending of syrups and in order that he might have a customer for the goods he sold as a broker or on commission from the various houses which he has testified about."

"If you believe that that is a correct explanation of what he did, then of course, you won't consider that as any evidence itself—that is, those sales and so forth—as any evidence against him. On the contrary, if you believe he did that because he was the real owner or was interested in any manner in that place, then you may find him guilty; because I instruct you, Gentlemen, that if any man knowingly supplies goods or knowingly contributes to a place or to a man engaged in the manufacture of alcoholic liquor contrary to the law, then he is equally guilty, because the statute of the United States provides that all persons who aid and assist in the commission of a crime are principals therein."

"Evidence has been introduced here, Gentlemen, as to the good character or good reputation of Mr. Hieronimus. I instruct you that evidence of a good reputation is real evidence in a man's behalf, and in a case of doubt may weight the scales so that you will feel the case had not been proved to you to a moral certainty and beyond a reasonable doubt. But, Gentlemen, you will bear in mind, that evidence of reputation is evidence in regard to what people think about a man; whereas his character is what he really is. If you find from the evidence,

in spite of the fact that Mr. Hieronimus had a good reputation, he was actually interested or had aided or assisted in this business then, of course, evidence of his good reputation will not save him."

"There has been evidence introduced here, Gentlemen, admitted by the Court, to the effect that on one occasion a truck belonging to Mr. Hieronimus, and driven by his employee, was seized with a quantity of beer upon it; and likewise evidence to the effect that upon another occasion there was a truck backed up to Mr. Hieronimus' office on Stewart Street, which was likewise loaded with beer, and which was contraband, and in fact, evidence that Mr. Hieronimus was arrested therefor. That evidence was admitted for one purpose, and for one purpose alone, and that is this: That Mr. Hieronimus testified that he had no knowledge of the fact (if it be a fact) that this place was conducted as a brewery, and therefore the law permits other matters or acts by the same person along the same line to be admitted that the jury may draw therefrom, if they see fit, the knowledge or inference that he had knowledge in this particular case. [106]

"You must bear in mind, however, before you can consider the evidence in regard to these two trucks that you must be convinced that Mr. Hieronimus had knowledge that the two trucks were transporting the beer before you can regard that—or draw any inference from it, that he had knowledge in this particular case."

"The law, as I think you know, requires a unanimous verdict."

"Any exceptions, Gentlemen?"

Thereupon, the following proceedings were had and exceptions taken:

Mr. WILLIAMS.—I would like to particularly except to the failure of the Court to give the two instructions I requested at the conclusion of the trial, and in the failure to give the instructions requested by us,—I have not checked them—

The COURT.—I think you will protect yourself on that Mr. Williams by excepting to the failure of the Court to give the instructions requested by the defendants, Nos. 1 to 17 inclusive.

Mr. WILLIAMS.—Thank you, your Honor, I will follow that suggestion. [107]

Thereupon, the jury retired to deliberate upon its verdict and subsequently returned into court and rendered the verdict finding the defendant, A. J. Vaught, guilty, on all four counts of the information, which verdict was filed and with the endorsements thereon is in words and figures following, to wit:

VERDICT.

"In the Southern Division of the United States District Court for the Northern District of California.

No. 16,120.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MAX A. STEARNS, A. J. VAUGHT, J. HIERONIMUS, JOHN BEMAS and JOHN DOE,

Defendants.

VERDICT.

"We, the Jury, find as to the defendants at bar as follows:

A. J. Vaught—Guilty All four.

J. Hieronimus—Not Guilty.

John Bemas—Not Guilty.

W. F. CORDES,

Foreman."

[Endorsed]: Filed January 27, 1925, at 3 o'clock and 20 minutes P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

After the empanelment of the jury and before the Court delivered its charge to the jury, the following instructions were requested by the defendants, and each of them, to be given to the jury, which requested instructions were refused by the Court and to which refusal of the Court, the defendants,

and each of them, then [108] *then* and there duly and regularly excepted, which requested instructions are as follows:

INSTRUCTION No. VII.

The Court erred in refusing to give to the jury instruction Number VII, requested on behalf of said defendant Vaught, which instruction is in words and figures following, to wit:

"I instruct you that the evidence obtained at 252 Spear Street was obtained unlawfully and in violation of the constitutional rights of the defendant Vaught, and I instruct you to acquit the Defendant, Vaught."

To which refusal of the Court the defendant Vaught then and there duly and regularly excepted.

INSTRUCTION No. XI.

The Court erred in refusing to give to the jury instruction Number XI on behalf of the defendant Vaught, which instruction is in words and figures following, to wit:

"The mere fact, if it be a fact, that the defendant Vaught was the lessee of the premises at 252 Spear Street and or in control thereof, is not sufficient to convict him, if he did not know that beer containing one half of one per cent or more of alcohol by volume was, or was to be, manufactured or possessed there, and aid and abet in its manufacture or possession."

To which refusal of the Court the defendant Vaught then and there duly and regularly excepted.

Thereupon, the attorneys for said defendant, Vaught, presented to the Court a motion for a new trial and for an order vacating the verdict of the jury on behalf of said defendant Vaught which is in words and figures following, to wit: [109]

(Title of Court and Cause.)

MOTION FOR ORDER VACATING VERDICT OF JURY AND GRANTING NEW TRIAL.

The defendants, A. J. Vaught, J. Hieronimus and John Bemas, in the above-entitled action do hereby move this Honorable Court for an order vacating the verdict of the jury herein and granting to these defendants and each of them a new trial for the following causes, and each of them, materially effecting the constitutional rights of these defendants, and each of them, to wit:

I.

Said verdict is contrary to the evidence adduced upon the trial hereof.

II.

The evidence adduced at said trial is insufficient to justify said verdict.

III.

Said verdict is contrary to law.

IV.

The Court erred in its instruction to the jury and in deciding questions of law during the course of the trial hereof, which errors were duly excepted to.

V.

That the Court erred in denying the motion of defendant Vaught to exclude certain evidence, which error was duly excepted to.

VI.

That the Court erred in admitting, in the course of the trial, incompetent, irrelevant and immaterial evidence on various occasions, which errors were duly excepted to.

This motion is made upon the minutes of the Court, and upon the said motion to exclude evidence and the affidavits attached [110] thereto and upon the testimony and evidence introduced at the trial.

Dated: January 27, 1925.

(Signed) WILLIAMS, KELLY & McDONALD,
Attorneys for Defendants.

[Endorsed]: Filed January 27, 1925. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

Said motion for a new trial was duly argued by the attorneys on behalf of defendant Vaught, and was thereupon presented to the Court for its decision, and after due consideration, the Court denied the motion for a new trial and to vacate the verdict of the jury, to which ruling, the attorneys for the defendant, Vaught, then and there duly and regularly excepted.

Thereupon, the said Court as punishment for said offense, imposed upon the said defendant Vaught, imprisonment in the County Jail, city and county of San Francisco, State of California, for

the period of one year and that he be fined in the sum of One thousand Dollars ($1,000.00)

The above bill of exceptions contains all of the evidence, oral and documentary, and all of the proceedings relating to the trial, judgment and conviction and sentence, motion for a new trial, and to vacate the verdict of the jury, motion for directed verdict and petition for the exclusion of evidence, of the defendant Vaught.

It is hereby stipulated and agreed, by and between the attorneys for the United States and for the defendants, and each of them, that all exhibits introduced in evidence and for identification upon the trial of the above-entitled cause and now in the custody of the clerk of the court, shall be deemed to be included as a part of the foregoing bill of exceptions with the same effect in all respects as if incorporated in said bill of exceptions. In the event the said exhibits are not so numbered as to identify the same, [111] they shall be marked by the Court upon its certification of this bill of exceptions so as to identify the same.

It is further hereby stipulated and agreed that this bill of exceptions may be used as the bill of exceptions for the writ of error sued out by said defendant in the above-entitled cause.

Dated: February 2d, 1925.

WILLIAMS, KELLY and McDONALD,
Attorneys for Defendant, Vaught.

STERLING CARR,
United States Attorney,

KENNETH C. GILLIS,
Asst. United States Attorney. [112]

In the Southern Division of the United States District Court in and for the Northern District of California.

No. ——.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. J. VAUGHT et al.,

Defendants.

STIPULATION SETTLING BILL OF EXCEPTIONS.

It is hereby stipulated and agreed by and between the attorneys for the United States and the attorneys for the defendant, A. J. Vaught, that the proposed bill of exceptions of said defendant, and the proposed amendments thereto of the United States have been correctly engrossed and have been presented in time, and as engrossed may be approved, allowed and settled by the Judge of the above-entitled court as correct in all respects, and that the same shall be made a part of the record in said case, and is hereby made a part of the bill of exceptions therein and shall be, and is, the bill of exceptions upon the writ of error sued out for said defendant.

Dated: February 16th, 1925.

WILLIAMS, KELLY and McDONALD,
Attorneys for Defendant.

STERLING CARR,
U. S. Attorney.

KENNETH C. GILLIS,
Asst. U. S. Atty. [113]

In the Southern Division of the United States District Court in and for the Northern District of California.

No. ——.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

A. J. VAUGHT et al.,
Defendants.

ORDER APPROVING AND SETTLING SUPPLEMENTAL BILL OF EXCEPTIONS.

The foregoing bill of exceptions duly proposed and agreed upon by the counsel for the respective parties is correct in all respects and is hereby approved, allowed and settled and made a part of the record herein as per the stipulation of the attorneys for the respective parties.

Dated: February 18th, 1925.

JOHN S. PARTRIDGE,
U. S. District Judge.

[Endorsed]: Lodged Feb. 4, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Filed Feb. 19, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [114]

In the Southern Division of the United States District Court for the Northern District of California.

No. 16,120.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MAX A. STEARNS, A. J. VAUGHT, J. HIERONIMUS, JOHN BEMAS and JOHN DOE.

PETITION FOR WRIT OF ERROR.

Now comes your petitioner, A. J. Vaught, one of the defendants herein, and brings this petition for writ of error to the District Court of the United States, in and for the Northern District of California, First Division, and in that behalf your petitioner respectfully shows:

That on the 27th day of January, 1925, there was made, given and rendered in the above-entitled court, a judgment and sentence against the defendant A. J. Vaught, your petitioner, wherein and whereby your petitioner, said A. J. Vaught, was adjudged and sentenced to imprisonment, to wit: The said A. J. Vaught to be imprisoned for the term of one year in the County Jail, city and county

of San Francisco, State of California, and to pay a fine of One Thousand Dollars ($1,000.00); and said defendant, your petitioner, shows that he is advised by counsel and that he avers that there was and is manifest error in the record and proceedings had prior thereto in said cause and in the making, giving and rendition and entry of said judgment and sentence to the great injury and damage of your petitioner, all of which errors will be more fully made to appear by an examination of the bill of exceptions to be tendered and filed and in [115] the assignment of errors hereinafter set out and to be presented herewith; and to that end thereafter that the said judgment, sentence and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioner now prays that a writ of error may be issued directed therefrom to the District Court of the United States for the Northern District of California, returnable according to law and the practice of this Court, and that there may be directed to be returned pursuant thereto a true copy of the record, bill of exceptions, assignment of errors and all proceedings had in said cause, and that the same may be removed to the United States Circuit Court of Appeals for the Ninth Circuit, to the end that error, if any hath happened, may be duly corrected and full and speedy justice done your petitioner.

And your petitioner makes the assignment of errors presented herewith, upon which he will rely and which will be made to appear by a return of the said record, in obedience to the said writ.

WHEREFORE, your petitioner prays the issuance of a writ as herein prayed, and prays that the assignment of errors presented herewith may be considered as his assignment of errors upon the writ, and that the judgment rendered in this cause may be reversed and held for naught, and that said cause be remanded for further proceedings, and that he may be awarded a supersedeas upon said judgment and all necessary and proper process, including bail.

Dated: February 2d, 1925.

R. J. VAUGHT,
Petitioner. [116]

WILLIAMS, KELLY AND McDONALD,
Attorneys for Petitioner.

[Endorsed]: Filed Feb. 4, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [117]

In the Southern Division of the United States District Court for the Northern District of California.

No. 16,120.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MAX A. STEARNS, A. J. VAUGHT, J. HIERONIMUS, JOHN BEMAS, and JOHN DOE,
Defendants.

ASSIGNMENTS OF ERROR.

Now comes the defendant A. J. Vaught, through his attorneys, Williams, Kelly and McDonald, and specifies the following as the errors upon which he will rely and which he will urge on his writ of error in the above-entitled case, to wit:

I.

The Court erred in denying the petition of the defendant A. J. Vaught, made previous to the trial of the above-entitled case, that an order be made prohibiting and restraining Samuel F. Rutter, Prohibition Director of the United States, and the United States Attorney for the Northern District of California, from using or allowing to be used against defendant A. J. Vaught the property found in the premises at 252 Spear Street, San Francisco, California, and that said property be excluded from evidence in this case, to which ruling said defendant Vaught then and there duly and regularly excepted.

II.

The Court erred in denying the motion of the defendant A. J. Vaught for an order suppressing and excluding all of the evidence that was acquired or obtained from or within the premises 252 Spear Street in the city and county of San Francisco, at the time said motion was made during the trial and after the impanelment of the jury, to which ruling said defendant Vaught then and there duly and regularly excepted. [118]

III.

The Court erred in denying the motion of the attorneys for the defendant Vaught, to strike out the answer of the witness Edward Powers, in answer to a question propounded to him on direct examination on behalf of the prosecution, as follows:

Q. Then you went to the side of the building?

A. I went to the right side of the building; I saw a piece of the corrugated iron on the side loose; I stretched that and looked in. I could smell the odor of beer; I saw a number of cases in there, and racks with bottles in them—

Mr. WILLIAMS.—Just a moment, Mr. Powers; if your Honor please, I would like at this time to make a motion to strike out the evidence so far as it relates to what was seen after he tore the corrugated iron apart, upon the theory that the tearing apart is against the law, and particularly after the view.

The COURT.—Motion denied.

Mr. WILLIAMS.—Exception.

IV.

The Court erred in overruling the objection made by the attorneys for the defendant Vaught to the testimony of the witness Edward Powers, on direct examination on behalf of the prosecution, as follows:

Mr. GILLIS.—Q. What kind of bottles were those you saw? A. Small pint bottles.

Mr. WILLIAMS.—Your Honor, the same objection. Your Honor, may I make a motion

and state my grounds, and then the ruling can apply to all this, so as not to delay the trial?

The COURT.—Yes, Mr. Williams.

Mr. WILLIAMS.—To that last question, I would like to have the permission of counsel and the Court that the following objection be interposed before the answer is given, or I can make it to the next one. We object to it in so far as the defendant Vaught is concerned, because it is evidence obtained or seen in the premises at 252 Spear Street, that the evidence is immaterial, irrelevant and incompetent, and in violation of the rights of the defendant Vaught under the Constitution as accorded to him by the Fourth and Fifth Amendments to the Constitution of the United States, and particularly in that it appears from the uncontradicted evidence at the hearing of the motion made by Vaught to suppress and exclude all evidence obtained from 252 Spear Street, heretofore made, that:

First.—There was no search-warrant.

Second.—There was no lawful entry by Government agents in that they had no reasonable grounds or probable cause to enter the said premises. [119]

Third. That there was no reasonable ground or probable cause to believe that beer containing more than one-half of one per cent of alcohol by volume was kept or being made in or upon the premises.

Fourth. That the alcoholic content of beer or cereal beverage makes no differ-

ence in the appearance or smell, that they look and smell exactly alike; that is to say there is no difference in the smell or appearance of beer that contains less than one-half of one per cent of alcohol by volume from the smell or appearance of beer that contains more than one-half of one per cent of alcohol by volume.

The COURT.—Objection overruled.

Mr. WILLIAMS.—Now, if your Honor please, I would not like to renew this long objection each time a question is asked, so may it be stipulated that it shall apply as being made to each and every question asked relating to evidence obtained within or from the premises at 252 Spear Street.

The COURT.—Let it be so understood, and the objection is overruled and an exception noted.

V.

The Court erred in not granting the motion of the defendant Vaught for a directed verdict of not guilty upon each of the counts of the information, which motion was made at the conclusion of the Government's case, to which ruling said defendant Vaught then and there duly and regularly excepted.

VII.

The Court erred in denying the motion of the defendant Vaught to instruct the jury to return a verdict of not guilty as to said defendant Vaught on all counts of the information on the ground of the insufficiency of the evidence as against said

defendant Vaught, to which ruling said defendant Vaught then and there duly and regularly excepted.

VIII.

The Court erred and committed a gross abuse of discretion in denying the motion for a new trial made by the defendant Vaught, to which said defendant Vaught then and there duly and regularly excepted.

IX.

The Court erred in not granting the motion of defendant [120] Vaught for an order vacating the verdict of the jury and granting a new trial and committed a gross abuse of discretion in so doing, to which defendant Vaught then and there duly and regularly excepted.

X.

The Court erred in refusing to give to the jury instruction Number VII requested on behalf of said defendant Vaught, which instruction is in words and figures following, to wit:

"I instruct you that the evidence obtained at 252 Spear Street was obtained unlawfully and in violation of the Constitutional rights of the defendant Vaught, and I instruct you to acquit the defendant Vaught."

To which refusal of the Court the defendant Vaught then and there duly and regularly excepted.

XI.

The Court erred in refusing to give to the jury instruction Number XI on behalf of the defendant Vaught, which instruction is in words and figures following, to wit:

"The mere fact, if it be a fact, that the defendant Vaught was the lessee of the premises at 252 Spear Street and or in control thereof, is not sufficient to convict him, if he did not know that beer containing one-half of one per cent or more of alcohol by volume was, or was to be, manufactured or possessed there, and aid and abet in its manufacture or possession."

To which refusal of the Court the defendant Vaught then and there duly and regularly excepted. [121]

XII.

The Court erred in overruling the objection made by the attorneys for the defendant Vaught, to the testimony of the witness, Edward Powers, on direct examination on behalf of the prosecution, as follows:

Mr. GILLIS.—What kind of bottles were those you saw? A. Pint bottles.

Mr. WILLIAMS.—Your Honor, the same objection, Your Honor, may I make a motion and state my grounds, and then the ruling can apply to all this, so as not to delay the trial.

The COURT.—Yes, Mr. Williams.

Mr. WILLIAMS.—To that last question, I would like to have the permission of counsel and the Court that the following objection be interposed before the answer is given, or I can make it to the next one. We object to it in so far as the defendant Vaught is concerned, because it is evidence obtained or seen in the premises at 252 Spear Street, that the evidence is immaterial, irrelevant and incompetent,

and in violation of the rights of the defendant, Vaught, as accorded to him by the fourth and fifth amendments to the Constitution of the United States, and particularly in that it appears from the uncontradicted evidence at the hearing of the motion made by the defendant Vaught to suppress and exclude all evidence obtained from 252 Spear Street, heretofore made, that;

First. There was no search-warrant.

Second. There was no lawful entry by Government agents in that they had no reasonable grounds or probable cause to enter the said premises.

Third. That there was no reasonable ground or probable cause to believe that beer containing more than one-half of one per cent of alcohol by volume was kept or being made in or upon the premises.

Fourth. That the alcoholic content of beer or cereal beverage makes no difference in the appearance or smell, that they look and smell exactly alike; that is to say, there is no difference in the smell or appearance of beer that contains less than one-half of one per cent of alcohol by volume from the smell or appearance of beer that contains more than one-half of one per cent of alcohol by volume.

The COURT.—The objection overruled.

Mr. WILLIAMS.—Now, if your Honor please, I would not like to renew this long objection each time a question is asked, so may it be stipulated that it shall apply as being made to each and every question asked relating to evidence obtained within or from the premises at 252 Spear Street.

The COURT.—Let it be so understood, and the objection is overruled and an exception noted.

Mr. GILLIS.—Q. I show you a bottle marked "29933," and ask you if that is the general character of bottle that you saw there at the time?

A. It is.

Mr. GILLIS.—I ask that this be introduced for identification. (The bottle was here marked U. S. Exhibit 1 for Identification.)

"Q. After smelling the odor of beer and seeing these bottles and things, did you see anything else?

A. Yes, I saw two men rolling barrels toward a high iron frame; I afterwards found out it was some sort of a washer or sterilizer.

Q. Then what did you do?

A. I walked to the front of the building and told the other agents that they were operating— [122]

Q. Don't give any conversation that you had with them, Mr. Powers.

A. As I walked to the front of the building and waited until a party came and delivered a package, and they went inside; as they opened the door to receive the package, I walked in.

Q. With him or behind him?

A. Behind him. I saw the cases of beer, the bottles of beer, and the machinery.

Q. Was the door opened for the package from the outside or from the inside?

A. From the inside.

Q. When you got inside the door, just inside, what did you see with reference to the arrangement of the building, there?

A. There was an extra door on the inside.

Q. What was that door for, and what did it do?

A. It was to obscure the view from—

Mr. WILLIAMS.—I object to that as calling for the conclusion and opinion of the witness.

Mr. GILLIS.—What did it do, Mr. Powers?

A. It blocked the view of anyone from the sidewalk when the front door was open.

Q. How large a door was that?

A. I should judge about eight or ten feet high.

Q. How wide? A. Completely across.

Q. Across that section of the building?

A. Across that section of the building.

Q. Was that door open or shut when you get in?

A. Partly open.

Q. It was partly open? A. Yes, sir.

Q. Could you see on further?

A. Yes, I could see on further.

Q. Did you see any of the defendants there at that time when you first went in?

A. I saw the defendant Beamish.

Q. That is the gentleman in the center here, at the end of the table?

A. Yes, and also another man.

Q. That other man is not here now? A. No.

Q. As I understand it, he escaped at that time?

A. He did.

The COURT.—How did he escape?

A. I followed him around the building for an hour or two, and I left him in charge of one of the other agents in the rear of the building, and when I went back there he was gone. I was not in charge of the job.

Mr. GILLIS.—Q. Did you make an inspection of

the building itself to see the apparatus that was there? A. I did.

Q. What apparatus or machinery did you see there?

A. Two 5000-gallon beer vats, two flat fermenting vats, a pasteurizing machine, a bottling and capping machine, a washing machine, and 25 sacks of sugar, and a lot of dynamos and motors there.

Q. Did you see any of these bottles that you have identified here, similar to U. S. Exhibit 1 for identification? A. I did.

Q. With liquid in them?

A. With liquid in them.

Q. Approximately how many?

A. I should judge there were over 500 cases, about 48 pints each.

Q. To the case? A. To the case.

Q. What was the defendant Beamish doing when you went in?

A. After I walked away from the door he continued on washing barrels. They were turning water into the barrels and then emptying them again.

Q. Did you inspect the rear part of the building?

A. I did.

Q. What did you find there?

A. I found two large vats concealing the hole that led to the premises of Tway, the shipsmith. [123]

Q. Immediately adjoining this building?

A. Immediately to the rear.

Q. What kind of a partition was between Mr. Tway's place and this place?

A. That was of corrugated iron; but that was cut out; a sort of a doorway was cut out.

Q. How large?

A. About three feet wide by three feet wide. It was concealed by sacks from Mr. Tway's shop. The side where the brewery was, was concealed by these large tanks or vats.

Q. Was that open? A. That was open, yes.

Q. Did you inspect to see whether or not there was any connection of pipes there with Mr. Tway's place?

A. Yes, there was a pipe connecting from Mr. Tway's boiler and running through and connecting with this beer still in the prmises at 252 Spear Street.

Q. Did you have any talk with Mr. Beamish there at the time?

A. Yes, I spoke to Mr. Beamish, and he didn't know who he was working for, or why he was there or anything else. He seemed to know absolutely nothing.

Q. Will you describe the front door at 252 Spear Street with reference to how you got in from the outside?

A. It is a sliding door. The way of opening the latch is to insert a piece of stick and lift up the latch and then push the door back.

Q. Is there any way of getting the door open without using that little piece of stick?

A. No, sir.

Q. How large is the opening through which this stick is put?

A. Just about an inch; just a small hole.

Q. Just a small hole? A. Yes, sir.

Q. Did you see anyone come in through that door using that means of ingress while you were there?

A. I saw a gentleman that gave the name of Vaught.

Q. He is the gentleman sitting there behind Mr. Kelly? A. Yes, sir.

Q. How did he gain admission there?

A. He inserted that small stick and pushed the door back and stepped inside.

Q. And stepped inside? A. Yes.

Q. And closed the door?

A. Well, I was there, and I closed the door.

Q. Did you have any talk with him?

A. Yes, I had a talk with him.

Q. At that time? A. I did.

Q. What did he say?

A. I asked him what he was doing there and he said he met a fellow in a restaurant, and the fellow told him where he could get some good beer, and so he said he came down there to get some. I asked him what his name was, and he told me that his name was A. J. Vaught. I said, "Who is the lady in the machine?" He said, "That is my wife." I said, "Your wife?" He said, "Yes."

Mr. GILLIS.—Well, you went out and interviewed her? A. Yes, sir.

Q. And then you came back? A. Yes, sir

Q. And had a further talk with Mr. Vaught?

A. Yes, sir.

Q. What did you say then to Mr. Vaught?

A. I told him that the lady said she was not his wife, and his name was not A. J. Vaught, that his name was Parker.

Q. What did he say to that?

A. He said nothing to that.

Q. Did you have any further talk with him?

A. No, Mr. Shurtleff was then talking to him.

Q. Do you know whether or not the United States Chemist came there at that time?

A. We sent for a chemist immediately.

Q. And he came? A. And he came. [124]

XIII.

The Court erred in overruling the objections made by the attorneys for the defendant Vaught to the testimony of the witness, A. R. Shurtleff, on direct examination on behalf of the prosecution, as follows:

Mr. GILLIS.—Q. Your position with the Government is what?

A. A Federal Prohibition Agent.

Q. How long have you been such?

A. Five years this month.

Q. On December 13, 1924, did you have occasion to visit 252 Spear Street, San Francisco?

A. I did.

Q. Who did you go there with, Mr. Shurtleff?

A. Agents Powers and Toft.

Q. When you arrived at the building, just what did you do?

A. I went around to the right side of the building, facing it, Agent Powers and I; Mr. Powers saw

a loose piece of galvanized iron, and we lifter the corner up and we looked in. At the same time we could smell beer. Upon looking in the building, we could see bottles with no labels on them sitting in the racks—

Mr. WILLIAMS.—If your Honor please, the order of the Court will be that my objection goes to this testimony also, the same as with Mr. Powers?

The COURT.—Yes.

(The objection referred to is that set forth hereinabove, in paragraph "IV" of this assignment of errors, and again set forth in paragraph "XII" hereinabove, in this assignment of errors, which said paragraphs are hereby referred to and made a part hereof, to the extent of all the quoted portion of paragraph "IV" and the portion of paragraph "XII" commencing with the words "Mr. Gillis: What kind of bottles," to and including the words "The Court: Let it be so understood, and the objection is overruled and an exception noted.")

Mr. GILLIS.—Q. Those bottles which you saw were similar to Government's Exhibit 1 for identification? A. Yes.

Q. You say there were no labels on them that you could see? A. No, sir.

Q. Where did you go then, and what did you do?

A. We went around to the front of the building and stayed near the automobile for five or ten minutes; presently a man drove up and dropped off a package of bottle covers at the side of the

door; we waited for a few minutes and Mr. Beamish came to the door and opened the door. At that time agent Powers stepped up to the door, and we walked in.

Q. Did you go in with Mr. Powers?

A. I followed him in.

Q. What did you see when you went in?

A. We estimated that there were about 500 cases of beer and various kinds of machinery for the manufacture of beer, for washing bottles, and tages and everything to make beer was there.

Q. Similar to the list of machinery and vats Mr. Powers has already testified to? A. Yes.

Q. Did you have any talk with Mr. Beamish at that time yourself?

A. We tried to talk to him, but he didn't care to talk.

Q. He would not talk at all? A. No.

Q. Did you talk to Mr. Vaught any, or did you see him there? A. I did.

Q. When did you first see him?

A. When we were in the building some time, I don't know just how long the front door was closed, and Mr. Vaught opened it up with a small stick that you insert in a small hole to throw the latch back and stepped inside. That was the first time I saw him. [125]

Q. Did you have a talk with him yourself?

A. We talked with them. I talked with him; I asked him what he was doing there; he stated he met some man uptown who told him where he could

get some good beer, and he said he was there looking for some good beer.

Q. Did you have any additional talk with Mr. Vaught?

A. I talked with him when he was riding over to the police station. He denied everything. I was talking about Vallejo, and he denied that the plant had been moved from there.

Q. I show you some photographs and ask you to look those over; I will ask you if you recognize them. A. Yes, sir.

Q. When were these photographs taken?

A. On December 13th.

Q. That was the day of the seizure?

A. The day of the seizure.

Q. What do they represent? I will show you this one photograph and ask you what that represents?

A. This is a photograph of the boiler where the steam was coming from in the shipsmith's shop.

Q. That was Mr. Tway's shop? A. Yes.

Q. Do you know whether the boiler depicted in this picture was hooked up in any way?

A. A steam line was running from that plant into the brewery.

Q. Was that taken at the same time?

A. Yes, that is a picture of Mr. Vaught.

Mr. WILLIAMS.—Just a moment. I do not think that is pertinent at this time.

Q. When that picture was taken of Mr. Vaught, was Mr. Vaught under arrest?

A. He was under arrest and he kindly consented—

(After some discussion the picture was kept out of evidence.)

Mr. GILLIS.—Very well, I will not offer that one. I offer the balance of the photographs and ask that they be marked U. S. Exhibit 2. (The photographs were here marked U. S. Exhibit 2.)

Q. This picture that I show you, what is that Mr. Shurtleff?

A. Polished tanks upstairs in the building. They were very highly polished. They were up in the attic.

Q. And this picture that I am showing you?

A. One of the big tanks used in the premises.

Q. And this one, you have already stated, is the steam plant in Mr. Tway's place that was connected? A. Yes.

Q. And the next picture I show you?

A. That shows a number of the 500 cases that we have spoken about.

Q. And the next picture?

A. That shows the barrels, the bottle washer and other machinery. This picture is of Tway's shop.

Q. And shows what? A. It shows the hole.

Q. What hole?

A. Where they can get through from one building to another.

Q. What building do they get through from?

A. They go from 252 Spear Street to Tway's shop.

Q. What is this picture?

A. That was another picture of the steam boiler showing the pipe connection.

The COURT.—The pipe connection from Tway's shop? A. Yes, sir.

Mr. GILLIS.—I show you a slip of paper and ask you if you recognize that? A. Yes, sir.

Mr. WILIAMS.—Your Honor, this was seized upon the premises, and is subject to our objection and motion.

The COURT.—Yes.

Mr. GILLIS.—Where was this slip of paper that I show you taken from?

A. It was taken from the premises at 252 Spear Street.

Q. At that time? A. Yes, sir.

Mr. WILLIAMS.—I object to it, your Honor, as being subject to our general objection, on the grounds made at the opening.

The COURT.—Q. This was found on the premises? A. Yes, sir.

Mr. WILLIAMS.—I might make another objection, that there is no connection made at this time. [126]

Mr. GILLIS.—I ask that it be introduced in evidence.

The COURT.—There is some evidence that Mr. Vaught's true name is Parker.

Mr. GILLIS.—Yes, there has been some evidence on that.

Mr. WILLIAMS.—I do not think that there can be any evidence that his true name is Parker.

Mr. GILLIS.—Nor his true name but a name that he went under.

Mr. WILLIAMS.—The witness asked him if it was not the fact. I will state to the Court that Vaught's true name is Vaught. He was at one time a boxer or prizefighter, and went under the name of Parker and followed that name quite a lot.

The COURT.—I will admit it.

Mr. WILLIAMS.—I don't make any objection on that ground, I make it on the broad ground.

The COURT.—Yes, I will overrule the objection, I think that is covered, Mr. Williams, by the recent case of Sayers, in the Court of Appeals.

(The paper was here marked 'U. S. Exhibit 3.')

Mr. GILLIS.—In examining the bottles you found in that place, Mr. Shurtleff, did you find any labels on any of the bottles? A. No, sir.

Q. No labels of any kind? A. No, sir.

XIV.

The Court erred in overruling the objection made by the attorneys for the defendant Vaught to the admission in evidence of certain bottles and their contents as exhibits upon their being offered by the prosecution, as follows:

The COURT.—Can't you let the chemist go, Mr. Gillis?

Mr. WILLIAMS.—We will stipulate that this beer contains more than one-half of one per cent of alcohol by volume.

The COURT.—How much does it contain?

Mr. GILLIS.—If you will stipulate that it is

over 4 per cent, Mr. Williams, I will take the stipulation.

Mr. WILLIAMS.—I don't know that; I never tasted it.

Mr. LOVE.—(the chemist): Some is 4.3 and some is 4.4.

Mr. WILLIAMS.—We will accept that statement.

The COURT.—Gentlemen: The beer contains 4 or more per cent of alcohol by volume. That is all Mr. Love, you can go now.

Mr. GILLIS.—I ask that all these bottles be introduced in evidence, 29923, 29925, 29926, 29927—

The COURT.—That is enough, Mr. Gillis.

Mr. McDONALD.—It is subject to the objection, your Honor, heretofore made.

The COURT.—Yes.

(The objection referred to by the Court and by Mr. McDonald set forth hereinabove in this assignment of errors in paragraph "IV" and again in paragraph "XII," of which paragraphs are hereby referred to and made a part hereof, to the extent of all the portion of paragraph "IV," which is quoted, and the portion of paragraph "XII" commencing with the words, Mr. GILLIS.—What kind of bottles, to and including the words, The Court.—Let it be so understood, and the objection is overruled and an exception noted.) [127]

WHEREFORE: For the many manifest errors, the defendant, A. J. Vaught, through his attorneys, prays that said sentence and judgment of convic-

tion be reversed, and for such other and further relief as to the Court may seem meet and proper.

Dated: February 2, 1925.

WILLIAMS, KELLY & McDONALD,
Attorneys for Defendant, A. J. Vaught.

[Endorsed]: Filed Feb. 4, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [128]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Tuesday, the third day of February, in the year of our Lord one thousand nine hundred and twenty-five. Present: the Honorable JOHN S. PARTRIDGE, District Judge.

No. 16,120.

UNITED STATES OF AMERICA,

vs.

A. J. VAUGHT, MAX A. STEARNS, J. HIERONIMUS, JOHN BEMAS & JOHN DOE.

MINUTES OF COURT—FEBRUARY 3, 1925—(ORDER DENYING PETITION FOR WRIT OF ERROR).

Defendant A. J. Vaught's petition for writ of error, etc., having been heretofore submitted and

now being fully considered by the Court, IT IS ORDERED that said petition be and the same is hereby denied.

Page 516, Vol. 64. [129]

In the Southern Division of the United States District Court for the Northern *Division* of California.

No. 16,120.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MAX A. STEARNS, A. J. VAUGHT, J. HIERONIMUS, JOHN BEMAS and JOHN DOE,

Defendants.

ORDER ALLOWING WRIT OF ERROR.

On this 16th day of March, 1925, came before the undersigned A. J. Vaught, defendant in the above-entitled cause, and presented to the undersigned his petition for the allowance of a writ of error to the District Court from the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the correction of errors complained of in said petition, together with his assignment of errors, intended to be urged by him in support of said writ of error, said petition in behalf of the above-named defendant, Vaught, and said assignment of errors on behalf of said defendant, Vaught, having here-

tofore been filed in the above-entitled cause in the office of the Clerk of said District Court in accordance with the rule of said United States Circuit Court and the proposed bill of exceptions of said defendant Vaught having been prepared and served upon the United States Attorney.

Upon consideration whereof, IT IS HEREBY ORDERED by the undersigned, in pursuance of the prayer of said petition for a writ of error filed in behalf of said defendant Vaught, that a writ of error be allowed to said defendant Vaught as prayed for in the petition filed by him, and that said writ of error operate as a supersedeas staying the execution of judgment and sentence pronounced in said District Court upon said defendant Vaught during the pendency of said writ of error; and that upon [130] service of said writ of error the said defendant, A. J. Vaught, be admitted to bail upon his entering into a good and sufficient bond in the sum of Twenty-five Hundred ($2500.00) Dollars; said bond to be conditioned as required by law with surety to be approved by the clerk of said District Court.

IT IS HEREBY ORDERED, that the clerk of the District Court make return of said error allowed to said defendant Vaught within thirty days by transmitting to said United States Circuit Court of Appeals a single, true copy of the record and bill of exceptions and proceedings and all things concerning the same in the above-entitled cause, and also the assignments of error and the petition

for writ of error filed in the above-entitled cause by the defendant Vaught.

Dated: March 16, 1925.

JOHN S. PARTRIDGE,
Judge of Said U. S. District Court.

[Endorsed]: Filed Mar. 16, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [131]

In the Southern Division of the United States District Court for the Northern District of California.

Number 16,120.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. *V.* VAUGHT et al.,

Defendant.

SUPERSEDEAS BOND.

KNOW ALL MEN BY THESE PRESENTS: That we A. J. Vaught, of San Francisco, California, as principal and Manuel Madrid, of Solana County, California, and Harry Lefkovitz, of San Francisco, California, as sureties, are held and firmly bound unto the United States of America, in the sum of Twenty-five Hundred ($2500) Dollars, to be paid to the United States of America, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our

heirs, executors and administrators, jointly and severally by these presents. SEALED with our seals and dated this 17th day of March, (1925) in the year of our Lord nineteen hundred and twenty-five.

THE CONDITION of the above recognizance is such that, whereas, at a term of the District Court of the United States for the Northern District of California, in and for the Southern Division thereof, in a suit pending in said court between the United States of America, plaintiff, and said A. J. Vaught and J. Hieronimus, Max J. Stearns, John Doe and John Bemas, defendants, a judgment and sentence was made given and entered against said defendant A. J. Vaught, and the said A. J. Vaught having obtained a writ of error to the [132] said United States District Court from the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, pursuant to the terms and at the times fixed in the Citation issued on said writ of error;

NOW THEREFORE, if the said A. J. Vaught shall appear personally or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit on such day of days as may be appointed for the hearing of said cause in said court and prosecute his writ of error, and if said A. J. Vaught shall obey and render himself amenable to any and all orders and processes of or made by said United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of said judgment and sentence as said Court may direct, if the judgment and sentence against

him shall be affirmed; and if he shall appear for trial in the District Court of the United States for the Northern District of California, on such day or days as may be appointed for the retrial by said District Court of said cause, and abide by and obey all orders of said District Court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation shall be void, otherwise to remain in full force and effect.

A. J. VAUGHT,
307 Bartlett St.
MANUEL MADRID,
Blue Rock Springs, Vallejo, Cal.
HARRY LEFKOVITZ,
525–18th Ave., San Francisco, Cal.

Acknowledged before me and approved the day and year first above written.

[Seal] FRANCIS KRULL,
United States Commissioner for the Northern District of California. [133]

Approved.

WALTER B. MALING,
Clerk of Said Court.
By C. M. Taylor,
Deputy Clerk of Said Court.

(O. K.—GILLIS.)

United States of America,
Northern District of California,—ss.

Manuel Madrid, whose name is subscribed to the foregoing undertaking as one of the sureties thereof, being first duly sworn, deposes and says:

That I am a householder in said District and reside at No. Box 403, Vallejo, Cal., State of California, and by occupation Hotel Summer resort Solano Co., California.

That I am worth the sum of Twenty-five Hundred Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution and that my property, now standing of record in my name, consists in part as follows:

Real estate, consisting of 156 acres of land in Solano Co., Cal., 1st Dist., Vallejo Township with improvements called Blue Rock Springs valued at $25,000.

That the encumbrances on the foregoing propperty are as follows: $16,000.

That my total net assets, above all liabilities and obligations on other bonds, is the sum of $10,000.

That I am not surety upon outstanding penal bonds, now in force, aggregating total penalty $——.

MANUEL MADRID. (Seal) [134]

Subscribed and sworn to before me this 17th day of March, 1925.

[Seal] FRANCIS KRULL,
United States Commissioner, for the Northern District of California.

United States of America,
Northern District of California,—ss.

Harry Lefkovitz, whose name is subscribed to the foregoing undertaking as one of the sureties thereof, being first duly sworn, deposes and says:

That I am a householder in said district and reside at No. 525–18th Ave., in the city of San Francisco, State of California, and by occupation merchant bottle supplies.

That I am worth the sum of Twenty-five Hundred Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution and that my property, now standing of record in my name, consists in part as follows:

Real estate, consisting of 523–525–18th Ave., two flats valued at $16,000, and ½ equity in business valued at $30,000.

That the encumbrances on the foregoing property are as follows: $5,000.

That my total net assets, above all liabilities and obligations on other bonds, is the sum of $15,000.

That I am not surety upon outstanding penal bonds, [135] now in force, aggregating total penalty $——.

HARRY LEFKOVITZ. (Seal)

Subscribed and sworn to before me this 17th day of March, A. D. 1925.

[Seal] FRANCIS KRULL,
United States Commissioner for the Northern District of California.

[Endorsed]: Filed Mar. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [136]

(COST BOND.)

KNOW ALL MEN BY THESE PRESENTS, That we, A. J. Vaught as principal and Manuel Madrid and Harry Lefkovitz, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred and Fifty ($250) Dollars to be paid to the said United States of America, its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with out seals and dated this 17th day of March, in the year of our Lord one thousand nine hundred and twenty-five.

WHEREAS, lately at a District Court of the United States for the Northern District of California in and for the Southern Division in a suit depending in said Court, between the United States of America, plaintiff, and Max J. Stearns, J. Hieronimus, John Bemas, A. J. Vaught and John Doe, defendants, a verdict was given by a jury and a judgment was rendered against the said A. J.

Vaught and the said A. J. Vaught having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if the said A. J. Vaught shall prosecute said writ of error to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue. [137]

A. J. VAUGHT. (Seal)
HARRY LEFKOVITZ. (Seal)
MANUEL MADRID. (Seal)

Acknowledged before me the day and year first above written.

[Seal] FRANCIS KRULL,
U. S. Commissioner Northern District of California at S. F.

United States of America,
Northern District of California,—ss.

Manuel Madrid and Harry Lefkovitz being duly sworn, each for himself, deposes and says, that he is a freeholder in said District, and is worth the sum of Two Hundred and Fifty ($250) Dollars,

exclusive of property exempt from execution, and over and above all debts and liabilities.

A. J. VAUGHT. (Seal)
HARRY LEFKOVITZ. (Seal)
MANUEL MADRID. (Seal)

Subscribed and sworn to before me this 17th day of March, A. D. 1924.

[Seal] FRANCIS KRULL,
U. S. Commissioner Northern District of California at S. F.

[Endorsed]: Amount and Form of bond and sufficiency of sureties approved.

JOHN S. PARTRIDGE,
Judge.

Filed Mar. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [138]

In the Southern Division of the United States District Court for the Northern District of California.

No. 16,120.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MAX A. STEARNS, A. J. VAUGHT, J. HIERONIMUS, JOHN BEMAS, and JOHN DOE,
Defendants.

STIPULATION AND ORDER TRANSMITTING ORIGINAL EXHIBITS.

It is hereby stipulated that all of the exhibits of the plaintiff above named, and all of the exhibits of the defendants above named and or of any of them, which were admitted in evidence on the trial of the above-entitled action, need not be printed in the bill of exceptions, nor in the transcript on appeal herein, but that the clerk of the above-named court shall transmit said exhibits to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and said exhibits shall be deemed a part of the bill of exceptions herein notwithstanding they are not printed therein, and may be referred to and used by any of the parties hereto without objection on the hearing on appeal with the same force and effect as though the same and each thereof had been printed in said bill of exceptions and in the transcript on appeal.

Dated: March 17, 1925.

STERLING CARR,
U. S. Attorney.
KENNETH C. GILLIS,
Assistant U. S. Attorney. [139]
WILLIAMS, KELLY and McDONALD,
Attorneys for Defendants.

It is so ordered. March 17, 1915.

JOHN S. PARTRIDGE,
Judge.

[Endorsed]: Filed Mar. 17, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [140]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON WRIT OF ERROR.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 140 pages, numbered from 1 to 140 inclusive, contain a full, true and correct transcript of the records and proceedings, in the case of the United States of America vs. A. J. Vaught et al., No. 16,120, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to the praecipe (copy of which is embodied herein).

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error is the sum of fifty-two dollars and forty-five cents ($52.45), and that the same has been paid to me by the attorney for the plaintiff in error herein.

Annexed hereto are the original writ of error, return to writ of error, and original citation on writ of error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 26th day of March, A. D. 1925.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [141]

In the Southern Division of the United States District Court for the Northern District of California.

No. 16,120.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MAX J. STEARNS, A. J. VAUGHT, J. HIERONIMUS, JOHN BEMAS and JOHN DOE,

Defendants.

WRIT OF ERROR.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Southern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between A. J. Vaught, plaintiff in error, and the United States of America, defendant in error, a manifest error hath happened, to the great damage of the said A. J. Vaught, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that

then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city and county of San Francsico, in the State of California, within thirty days from date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of [142] Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 16th day March, in the year of our Lord one thousand nine hundred and twenty-five.

[Seal] WALTER B. MALING,
Clerk of the United States District Court.
By C. M. Taylor,
Deputy Clerk, U. S. District Court, Northern District of California.

Allowed by

JOHN S. PARTRIDGE,
Judge. [143]

[Endorsed]: No. 16,120. In the District Court of the United States Northern District of California, Southern Division. United States of America, Plaintiff, vs. Max A. Stearns, A. J. Vaught, J. Hieronimus, John Bemas and John Doe, Defend-

ants. Writ of Error. Dated: February, 1925, Filed Mar. 16, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [144]

RETURN TO WRIT OF ERROR.

The answer of the Judges of the United States District Court, for the Northern District of California, to the within writ of error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this Writ was on the 16th day of March, A. D. 1925, duly lodged in the case in this Court for the within named defendant in error.

By the Court.

[Seal] WALTER B. MALING,

Clerk, U. S. District Court, Northern Dist. of California.

By C. M. Taylor,
Deputy Clerk. [145]

In the Southern Division of the United States District Court for the Northern District of California.

No. 16,120.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MAX A. STEARNS, A. J. VAUGHT, J. HIERONIMUS, JOHN BEMAS, and JOHN DOE,

Defendants.

CITATION ON WRIT OF ERROR.

United States of America,
Northern District of California,—ss.
To the United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office at the United States District Court for the Northern District of California, wherein A. J. Vaught, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, Judge of the United States District Court, for the Northern District of California, this 16th day of March, 1925.

JOHN S. PARTRIDGE,
United States District Judge.

Service of the within is hereby admitted this 16th day of March, 1925.

STERLING CARR,
United States Attorney. [146]

[Endorsed]: No. 16,120. In the District Court of the United States, Northern District of California, Southern Division. United States of America, Plaintiff, vs. Max A. Stearns, A. J. Vaught, J. Hieronimus, John Bemas and John Doe, Defendants. Citation for Writ of Error. Dated: March 14, 1925. Filed Mar. 16, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [147]

[Endorsed]: No. 4487. United States Circuit Court of Appeals for the Ninth Circuit. A. J. Vaught, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filed March 26, 1925.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.